

REDACTED BY ORDER OF THE COURT

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 MARSHALL DIVISION

4 UNILOC USA, INC., ET AL.) (

5) (CIVIL ACTION NO.

6) (2:17-CV-651-JRG

7 VS.) (MARSHALL, TEXAS

8) (

9 SAMSUNG ELECTRONICS AMERICA,) (MARCH 4, 2019

10 INC., ET AL.) (10:12 A.M.

11 PRE-TRIAL HEARING

12 BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP

13 UNITED STATES CHIEF DISTRICT JUDGE

14

15 APPEARANCES:

16 FOR THE PLAINTIFFS: (See Attorney Attendance Sheet docketed
17 in minutes of this hearing.)

18 FOR THE DEFENDANTS: (See Attorney Attendance Sheet docketed
19 in minutes of this hearing.)

20 COURT REPORTER: Shelly Holmes, CSR, TCRR
21 Official Reporter
22 United States District Court
23 Eastern District of Texas
24 Marshall Division
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25 (Proceedings recorded by mechanical stenography, transcript
produced on a CAT system.)

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I N D E X

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Be seated, please.

3 All right. This is the time set for a hearing
4 before the Court on pre-trial matters in the Uniloc versus
5 Samsung case. This is Civil Action 2:17-CV-651.

6 The Court will call for announcements at this
7 time.

8 What says the Plaintiff, Uniloc?

9 MR. DAVIS: Good morning, Your Honor. Bo Davis on
10 behalf of the Plaintiff, Uniloc. With me today is
11 Mr. Brian Tollefson, Mr. Mike Ercolini. We're ready to
12 proceed, Your Honor.

13 THE COURT: All right. I see you filed a notice
14 of appearance this morning, Mr. Davis.

15 MR. DAVIS: I did, Your Honor.

16 THE COURT: All right. Welcome to the case.

17 MR. DAVIS: Thank you.

18 THE COURT: What's the announcement for the
19 Defendants Samsung?

20 MS. SMITH: Good morning, Your Honor. Melissa
21 Smith on behalf of Samsung. I'm joined today by Mr. Rich
22 Edlin, Mr. Allan Kassenoff, Ms. Valerie Ho, Ms. Janice Ye,
23 and we also have some client representatives in the
24 courtroom today, Mr. Ken Korea and Mr. Jeff Myung. And
25 we're ready to proceed, Your Honor.

1 THE COURT: Thank you, Ms. Smith.

2 All right. Counsel, before we get into the
3 actually disputed pre-trial matters, let me go over some
4 preliminary matters and share some information with you
5 that I want to make sure you're aware of.

6 As everyone should know, this case is set for jury
7 selection and trial to begin on Monday, April the 1st of
8 this year at 9:00 a.m.

9 The Court intends to have the clerk play the FJC
10 patent video for the venire panel prior to jury selection.

11 Each side is going to be afforded 30 minutes per
12 side to address the panel as a part of voir dire.

13 As is the Court's typical practice, each side may
14 use, at its discretion, up to three minutes of its time for
15 a very high level, non-argumentative barebones review of
16 the issues that are encompassed in the case. But the vast
17 majority of your time should be used with regard to
18 directing specific questions to the panel, listing
19 information to secure a fair and impartial jury to hear the
20 evidence in this case.

21 With regard to the three-minute or less
22 introduction, if at any point I believe that gets to be
23 argumentative, I will stop you in front of the panel, so
24 make sure it's not.

25 I'm going to seat eight jurors to hear this case,

1 and each side will be afforded four peremptory challenges.

2 As I say, trial is set to begin here in the
3 Marshall Division on April the 1st at 9:00 a.m. Each side
4 will be afforded 10.5 hours to put on their evidence, not
5 including opening statements or closing arguments.

6 Opening statements will be 30 minutes per side.
7 And I remind counsel, these are opening statements. They
8 are not opening arguments. I seem to have had a rash of
9 cases lately where opening statements become a preliminary
10 final argument, and that's not what is expected by the
11 Court. You're there in openings to give the jury an idea
12 of what the evidence may show, not to argue ultimate
13 conclusions with regard to evidence that hasn't been
14 presented yet.

15 So if this trend continues, I may have to
16 interject some guidance to counsel during opening
17 statements. So perhaps this is the case that will help
18 break the trend and get it back on track.

19 30 minutes per side for opening statements. 30
20 minutes per side for closing.

21 Plaintiff can certainly break and use alternate
22 counsel on their closing if they'd like to. The only rule
23 for Plaintiffs' closing arguments is they must use at least
24 50 percent of their time in their first closing argument.

25 During the course of the trial, the Court will be

1 in chambers each morning by 7:30 and available to meet with
2 counsel to take up any late arriving disputes, issues that
3 haven't been resolved through the meet and confer process
4 overnight, or any other housekeeping matters that arise.

5 That will maximize the use and benefit of the
6 designated trial time before the jury.

7 You're to exchange demonstratives with each other
8 overnight and report to the Court by email by 10:00 p.m. as
9 to which disputes have not been resolved through your
10 efforts to meet and confer.

11 Also, the Court has found that those 10:00 o'clock
12 emails tend to often obscure part of what is really at
13 issue, and oftentimes by 7:30 the next morning, a fair
14 portion of what's in the 10:00 o'clock email has been
15 resolved by continuing efforts to meet and confer.

16 Consequently, I've found that requiring the
17 parties to deliver a jointly prepared binder at 7:00
18 o'clock the next morning showing what's still at issue
19 since 10:00 o'clock the night before and including both
20 sides' supporting arguments and evidence is most helpful.
21 So I'm going to invoke that as a part of this trial, as
22 well.

23 So a joint submission in a three-ring binder by
24 7:00 o'clock the morning after you've met and conferred and
25 reported to the Court at 10:00 p.m. will be required.

1 With regard to any possible disputes regarding
2 deposition designations or counter-designations, those two
3 should be exchanged and discussed. However, in that
4 regard, I will take those on a rolling basis with the
5 requirement that they be presented and -- and discussed and
6 either resolved or left unresolved not later than the day
7 before the day you intend to use the deposition.

8 I don't want deposition disputes to come in at
9 7:30 in the morning, and, oh, we have to delay the trial
10 while we recut the video. So those need to come into the
11 Court, if they can't be resolved, not later than the day
12 before the day they intend to be played.

13 Also, it's my practice, unlike some courts, that I
14 will hear motions under Rule 50(a) by the Defendant not at
15 the close of the Plaintiffs' case-in-chief, but I'll hear
16 motions under Rule 50(a), both from the Defendant and any
17 motions offered by the Plaintiff, after all the evidence
18 has been presented and completed. After the Plaintiff has
19 rested its case-in-chief, the Defendants rested its
20 case-in-chief, and the Plaintiffs presented any rebuttal
21 case, then I'll take up motions under Rule 50(a) from both
22 sides.

23 After I've heard and ruled on motions under Rule
24 50(a), then the Court will conduct in chambers an informal
25 charge conference to meet with counsel and have an open,

1 informal, and fulsome discussion regarding differing issues
2 between the parties concerning the proposed final jury --
3 final jury instructions from the Court to the jury and the
4 verdict form.

5 After we've completed that informal charge
6 conference, the Court will take the input from both sides,
7 consider it, and generate what it believes to be the
8 appropriate final jury instruction and verdict form,
9 present those to counsel for their review, and then conduct
10 a formal charge conference on the record where either side
11 may offer such objections for purposes of the record that
12 they believe are appropriate and necessary.

13 With the arrival of Mr. Davis, both sides have
14 experienced local counsel in the case, and I think that's a
15 very positive development.

16 And I know local counsel are aware of this, but so
17 that there's no doubt, it's this Court's practice to
18 prohibit references to individuals before the jury by first
19 name only. Witnesses should not testify about Jack or John
20 or Jane or Jill. A lawyer should not refer to Robert or
21 Sarah or Elizabeth. First names only are inherently
22 confusing in the record, and they're not an appropriate
23 maintenance of the Court's necessary decorum.

24 Don't refer to individuals -- any individuals by
25 first name only in the presence of the jury and insist that

1 your witnesses follow that same practice.

2 Also, it's highly likely that in this case, there
3 will be sensitive or proprietary confidential information
4 that's necessary to be presented to the jury. I'll refer
5 you to the Court's standing order on sealing the courtroom
6 as the method to ensure that such information is protected.

7 It's my request and hope that you can collect and
8 present such confidential information at more or less one
9 time in your examination, if that's possible.

10 What I'm trying to avoid is a series of questions
11 that involve confidential information for which we seal the
12 courtroom, then we unseal the courtroom, a short series of
13 questions that don't involve any confidential information,
14 and then we go back to confidential information and seal
15 the courtroom again, and this on and off process becomes
16 highly disruptive.

17 To the extent you can collect and coalesce around
18 confidential information and present it without so many
19 breaks and disruptions, that certainly will be appreciated
20 by the Court.

21 But I do intend to follow the mechanism outlined
22 in my standing order for sealing the courtroom to address
23 and protect confidential information which will also seal
24 that portion of the record, as well. And that portion of
25 the record being sealed through the use the Court's

1 standing order should alleviate the need for post-trial
2 redactions. And I don't anticipate a broad-based or active
3 post-trial redaction practice by the parties.

4 To the extent there's a juror questionnaire in
5 this case, I refer you to the deputy in charge. To the
6 extent we haven't -- and I'm trying to remember. Has there
7 been a -- has there been a juror questionnaire submitted at
8 this point? I don't recall seeing one.

9 Are you aware of one --

10 MS. SMITH: No, Your Honor.

11 THE COURT: -- Ms. Smith?

12 Okay. Well, to the extent the parties want to
13 take advantage of using a juror questionnaire, then I'll
14 refer you to the deputy in charge for this division,
15 Ms. Clendening.

16 Also, I have a standing order on what's permitted.
17 You need to have a proposed juror questionnaire to her in
18 time for me to review it and in time for her to send it out
19 with the summons for the panel that will appear on April
20 the 1st.

21 Making sure that that's done timely so that it can
22 be delivered with the summons to the venire members is your
23 burden.

24 But you should find direct guidance on the makeup
25 of the questionnaire as a part of the Court's standing

1 order.

2 And once those questionnaires are returned, you
3 will need to consult with Ms. Clendening as to their
4 delivery to you prior to venire -- excuse me, prior to voir
5 dire.

6 Also, I want to make it clear that with regard to
7 the use of any such returned and completed juror
8 questionnaires, those documents and the material therein
9 are not to be copied or retained or scanned or reproduced.

10 We represent to those citizens summonsed for jury
11 duty who receive such a questionnaire, that they do not
12 need to worry about law firms keeping and retaining their
13 particular answers or responses. And so to do that, it's
14 incumbent that both sides not copy, retain, scan, or
15 otherwise maintain any of that information, other than
16 implementing and using the hard copies that the clerk's
17 office will give you in advance of the voir dire and which
18 should be returned after the jury is selected so they can
19 be destroyed and shredded.

20 We're going to use as much of the day as necessary
21 to get through as much of the pre-trial in this case as we
22 can today.

23 I will let you know that I've reserved time on
24 Tuesday, the 26th of March, for a follow-up pre-trial,
25 assuming it's necessary, beginning at 9:00 a.m. that day.

1 If we can cover everything today, fine. If we can't, then
2 our next chance at covering any remaining pre-trial issues
3 will be on March the 26th.

4 I'll also follow the same practice in this case
5 that I use in most trials, and that is that we will take
6 up and consider disputes regarding the admissibility of
7 exhibits as a part of the pre-trial process, and I'll
8 rule on those admissibility arguments and disputes such
9 that we can complete the pre-trial process with a defined
10 and finite list of pre-admitted exhibits, those exhibits
11 being ones for which there was no challenge as to their
12 admissibility or that the challenge was overruled by the
13 Court after considering the arguments on admissibility.

14 Those pre-admitted exhibits will then be able to
15 be used without a formal offer or any time consuming
16 introduction during the trial before the jury, but we will
17 keep a rolling account of those items used before the jury
18 in the record by having both sides announce before I bring
19 the jury in each morning, beginning on the second day of
20 the trial, those items that have been used from the list
21 during the preceding day's portion of the trial.

22 I typically take the exhibit disputes up as the
23 last matter in the pre-trial process, quite honestly,
24 because many of those disputes will fall away after you get
25 the benefit of my rulings on the dispositive motions and

1 the motions in limine. And that will be the practice I
2 follow here.

3 Whether we get here today or not or that carries
4 over until March the 26th remains to be seen.

5 I'm going to direct that the parties jointly
6 prepare in this case and submit to the Court juror
7 notebooks for use by the jury during the trial.

8 Those juror notebooks should be -- as typically
9 used in a patent infringement case in this court, they
10 should be appropriate sized three-ring binders containing a
11 copy of the patent-in-suit, a copy of the claim
12 construction terms that the Court has construed on a
13 side-by-side comparison with the claim terminology on the
14 left margin -- on the left column, rather, and the adopted
15 construction by the Court corresponding on the right
16 column.

17 There -- this is not a reproduction of the claim
18 construction order. There's no text or analysis to be
19 included, simply the net result, disputed term on one side
20 and adopted construction on the other side.

21 To the extent terms were not construed by the
22 Court or were construed by the Court to be their plain and
23 ordinary meaning, then they don't need to be included in
24 this chart because any language not expressly construed
25 otherwise is going to receive its plain and ordinary

1 meaning during the course of the trial.

2 Additionally, these notebooks should include
3 tabbed pages for each of the witnesses that may appear,
4 either live or by deposition, including a
5 head-and-shoulders photograph of the witness superimposed
6 at the top of each page with their appropriate and complete
7 name identifying them listed below the photograph.

8 They shouldn't be characterized or identified
9 other than by name. It's appropriate below the photograph
10 to have Dr. John Jones. It's not appropriate to have
11 Dr. John Jones, Plaintiffs' expert on damages.

12 So identify them by appropriate name only. The
13 remainder of those pages should be simply ruled lines for
14 possible note taking.

15 And in addition to the note taking that may take
16 place on those witness pages, you should also include in
17 the back of these notebooks a new three-hole punched legal
18 pad for note taking purposes. And you should place in the
19 front pocket of each notebook a non-clicking ballpoint pen.

20 And 10 of those notebooks should be delivered to
21 chambers not later than 3:00 p.m. on March the 28th.

22 And, again, both sides are jointly directed to
23 work together in preparation and delivery of those juror
24 notebooks.

25 As in any patent infringement case, there will

1 surely be disputed issues that will be taken up by expert
2 witnesses, and I expect there will be competing and dueling
3 experts in this case, as is typical.

4 I remind you that your expert witnesses are
5 confined to the four corners of their expert reports, and
6 their testimony is limited to the matters set forth in
7 their expert reports.

8 Objections that arise during a trial like this
9 that an expert witness is testifying or attempting to
10 testify outside the bounds of their written report are
11 highly disruptive. They occasionally are necessary, and
12 while I don't discourage you from making that objection if
13 you feel it's meritorious, I will let you know that I have
14 had cases where those type of objections were made not for
15 purposes of any inherent merit to the objection but in my
16 view were done strategically because they are so disruptive
17 and require the Court to send the jury out while it takes
18 up the issue with counsel in conjunction with reviewing the
19 particular report that may be at issue.

20 If at any point I believe that kind of objection
21 is made for strategic or non-meritorious purposes, you
22 should be aware I will probably sanction the offending
23 party.

24 So to the extent you need to make those objections
25 and there's a non-frivolous basis for doing it, feel free

1 to do so when you believe the interest of your client
2 dictate that. But be careful that you have a meritorious
3 basis for it, lest the Court be persuaded that the
4 opportunity to break the other side's rhythm and narrative
5 is offered for strategic and non-meritorious purposes.

6 All right. Do either Plaintiff or Defendants have
7 any questions about these instructions that I've gone over
8 with you?

9 MR. DAVIS: No, Your Honor.

10 MS. SMITH: No, Your Honor.

11 THE COURT: All right. Well, that being the case,
12 let's start with the dispositive motions that are at issue.

13 I've looked at the email from the parties with
14 regard to their proposed order. I think it's generally
15 appropriate. We may make a few changes as we go through.

16 I'd like to start with the motion for summary
17 judgment by Samsung regarding non-infringement. That's
18 Document 102.

19 And I'll hear initial arguments from the moving
20 Defendants from the podium.

21 And, counsel, given the number of lawyers we have
22 in the courtroom today, I have no problem with switching
23 out counsel from motion to motion and argument to argument.
24 Let's just simply begin each appearance at the podium with
25 an introduction of who you are for the record so that it's

1 straight in the record as to who argues what.

2 MR. KASSENOFF: Yes, Your Honor. My name is Allan
3 Kassenoff from Greenberg Traurig, and I represent Samsung
4 in this case.

5 And I'll be addressing our motion for summary
6 judgment of non-infringement.

7 THE COURT: All right. Let me hear your
8 arguments.

9 MR. KASSENOFF: Judge, there are five distinct
10 issues in connection with our motion. I'm going to touch
11 on all of them briefly today.

12 The first one is that the accused devices, which
13 are smartphones and watches, do not calculate the incline
14 as required by Claim 17, which is the only asserted
15 independent claim, which is a method claim.

16 The second point is Samsung does not induce
17 infringement by its customers.

18 The third point, the accused phones and watches,
19 which are devices obviously, cannot infringe method claims,
20 which, again, this case only deals with method claims.

21 Fourth point, Samsung's manufacture, offer to
22 sell, sale, and/or importation of these devices cannot as a
23 matter of law constitute infringement of method claims.

24 And, finally, Judge, there's no evidence that
25 Samsung itself uses or tests this accused functionality

1 which relates to calculating an incline in the United
2 States.

3 My first point, Judge, the accused devices, these
4 phones and watches, cannot be used by the customers or by
5 Samsung to infringe because they use barometer data to
6 calculate an incline.

7 Judge, the patent explains two distinct ways of
8 calculating an incline, accelerometer data and altimeter
9 barometer data, which the patent also refers to generically
10 as pressure sensor data.

11 The patent is very clear about these two distinct
12 mechanisms to use to calculate the incline.

13 Here, this is from the specification, Judge, at
14 Column 3, and it explains the accelerometer data is used by
15 incline logic to determine an incline associated with a
16 step.

17 Then it explains that a step has three parts,
18 vertical travel up, horizontal, and vertical travel down.
19 And it explains it uses this accelerometer data as follows:
20 By determining the difference between the vertical travel
21 up and the vertical travel down. And that, Judge, is the
22 incline.

23 The patent also explains a second mechanism to
24 calculate the incline, which, again, is a fundamentally
25 different calculation. And that's by using an altimeter, a

1 barometer, or a pressure sensor. And it explains at Column
2 3, a little further down, the altimeter's output indicates
3 the change in altitude.

4 And, again, Judge, that's what an altimeter does,
5 measures altitude, and you can use that to determine a
6 change in altitude.

7 And this information is used in one embodiment by
8 the incline logic to determine the incline. That's the
9 second way, using the barometer data, by measuring or
10 indicating the change in altitude.

11 That's consistent, Judge -- or I should say, the
12 change are consistent with that. You have independent
13 Claim 17 through the third step, which is calculating the
14 incline, and this is the first mechanism, by identifying
15 the vertical travel up portion of the step, identifying the
16 vertical travel down portion of the step, and then
17 computing a difference between the vertical travel up and
18 the vertical travel down. That's the accelerometer
19 mechanism.

20 The second mechanism is in Claim 18, and there you
21 see the method of Claim 17 further comprising the detecting
22 a change in altitude using an altimeter and then using that
23 change in altitude to verify the incline.

24 So, again, Judge, the specification explains, you
25 can use accelerometer data to identify a vertical travel

1 up, identify a vertical travel down, and compute a
2 difference. That's one way to calculate the incline.
3 That's the Claim 17 way.

4 The specification also explains you can use an
5 altimeter or a barometer to determine a change in altitude,
6 second way to calculate an incline.

7 It's confirmed that these are two different ways,
8 Judge, by comparing Independent Claim 17 and Claim 18 where
9 the altimeter mechanism is used to verify the incline.

10 So Claim 17, you calculate it in the first way.
11 To make sure you got it right, you do it a second way, the
12 barometer or altimeter way to verify.

13 This -- this understanding of the patent is
14 confirmed, Judge, by the prosecution history. This is
15 original Claim 17 and 18 that the inventors submitted to
16 the Patent Office, and you can see in original Claim 17,
17 the third limitation, the incline, very broad, calculating
18 an incline and associating the incline data with the step
19 data. It doesn't have any restrictions on how you
20 calculate the incline.

21 You can use accelerometer data. You can use
22 barometer data. You could use anything. Those are the
23 only two disclosed in the specification. But according to
24 Claim 17, as originally submitted to the Patent Office, no
25 restrictions.

1 But then Claim 18 says -- the dependent claim --
2 wherein the incline is calculated using data from an
3 altimeter.

4 So it's saying, 17 is broad, either accelerometer
5 or barometer/altimeter. 18 narrows it and says it must be
6 the altimeter.

7 THE COURT: Sounds like you're arguing claim
8 construction to me.

9 MR. KASSENOFF: Judge, what I'm really trying to
10 argue is not claim construction. It's -- I'm leading up to
11 explain why we don't do the incline calculation of Claim
12 17. It's -- it's not -- I would respectfully, Judge,
13 submit it's not claim construction. It's non-infringement.

14 And you may remember from the Markman hearing, I
15 had raised this as a potential issue, that they were going
16 to make this argument, and here we are.

17 And I believe, Judge, in your order -- in your
18 Markman order, you had said the claim, when read as a
19 whole, it's already in there, the accelerometer. And
20 that's all we're doing. We're showing how the
21 accelerometer is in there.

22 Just to continue, Judge, the original claims were
23 rejected by the Patent Office based upon prior art, and the
24 patentee, the applicants, had to amend it. And you can see
25 Claim 17, which was amended, and it was added, the exact

1 mechanism that's in the claim now, where the incline is
2 calculated by identifying vertical up, vertical down, and
3 computing a difference.

4 Now, the problem with that was Claim 18 can no
5 longer be simply wherein the incline is calculated using
6 data from an altimeter because the way Claim 17 read after
7 amended, it just wouldn't make sense because it wouldn't --
8 it wouldn't fit in because you can't use an altimeter to do
9 the vertical travel up and vertical travel down.

10 So that had to be amended, as well. And you can
11 see right there, Judge, it was amended from simply using
12 data from an altimeter to being an entirely new
13 calculation. And it's the verification step, a second
14 calculation.

15 This is from the Plaintiffs' complaint. They
16 recognize this, Judge, so Paragraph 8 of the complaint,
17 they're describing the '556 patent. And what it describes,
18 calculation of an incline by utilizing motion detected by
19 accelerometer. And they explain exactly what the patent
20 explains, where the calculation is performed for a step
21 based on identifying vertical travel up, vertical travel
22 down, and computing a difference.

23 And correctly in their complaint, they recognize
24 the second way. The invention also uses an altimeter to
25 determine a change in altitude where the incline logic

1 utilizes that change in altitude to make an additional
2 calculation of the incline.

3 It's very consistent, Judge, which leads me to
4 non-infringement.

5 What does -- what do Samsung's products do? They
6 utilize a barometer. That's both from the expert report of
7 Dr. Medvidovic, which he -- he carefully considered the
8 source code, spoke to Samsung engineers.

9 It's also from the expert report of Dr. Easttom,
10 Plaintiffs' witness. He recognized it uses the baro --
11 barometric sensor. Vertical is determined based upon
12 changes in pressure. That's not in dispute.

13 Now we get to why doesn't Samsung infringe?
14 Number one, we use the -- we use the Claim 18 method,
15 detecting a change in altitude via barometric pressure.

16 Now, if we look at Claim 17, it should be a bit of
17 a review. It's calculating an incline, and it's the
18 three-step process, identifying vertical travel up,
19 identifying vertical travel down, computing a difference.

20 Now, here's how you -- you construed the vertical
21 travel up portion and the vertical travel down portion in
22 your Markman opinion, Judge. What you said was the step is
23 the same step. And it's a single step. In other words,
24 what you need to do is you look at the vertical travel up
25 portion of a step, and then you look at the vertical travel

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1 [REDACTED] [REDACTED] [REDACTED]

2 [REDACTED] [REDACTED]

3 [REDACTED]

4 [REDACTED] Very different system.

5 You take another step. Now the person is at this
6 point, Judge. And what does it do? [REDACTED]

7 [REDACTED] [REDACTED]

8 [REDACTED]

9 [REDACTED] [REDACTED]

10 [REDACTED] [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED] [REDACTED]

14 [REDACTED]

15 What's Uniloc's argument in response? [REDACTED]

16 [REDACTED]

17 [REDACTED] [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 But, Judge, let me explain why it's not. [REDACTED]

23 [REDACTED]

24 [REDACTED] [REDACTED]

25 [REDACTED] [REDACTED]

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1 [REDACTED] [REDACTED]
2 [REDACTED]
3 [REDACTED] [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED] [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] They do not
12 calculate an incline based upon vertical travel up portion
13 of a step, vertical travel down portion of the same step,
14 and the difference therebetween.

15 The second argument they make is -- this is
16 straight from their -- their opposition to our motion.
17 Dr. Easttom found that the vertical travel up portion and
18 vertical travel down portion of a step are identified.
19 Dr. Easttom found that the accused Samsung products compute
20 the difference between those portions. Well, all that he's
21 doing in that -- all that Uniloc is doing is saying what
22 the claim requires.

23 The problem, Judge, is they rely upon
24 Dr. Easttom's infringement report which is conclusory. And
25 it's well-settled, you can't -- you can't create a genuine

1 issue of material fact just by having a conclusory expert
2 opinion.

3 And, Judge, I just chose one -- one section, one
4 paragraph from Dr. Easttom's infringement report that
5 addresses this limitation to show you how it's conclusory.

6 So here's what he said in Paragraph 110. And,
7 Judge, I -- I would submit that -- or not submit, but
8 Dr. Easttom's report, which was attached as Exhibit 9 to
9 Docket Entry 112, his entire discussion of limitation
10 17(c), which is the one we're talking about, the incline
11 calculation, takes place on Pages 43 through 53.

12 And, Judge, I have a copy of it here. If you
13 would like, I could go through paragraph by paragraph
14 showing how it's conclusory. I don't think that's the most
15 efficient use of our time today, but I would invite
16 yourself and the clerks to do that exercise.

17 But what I did is I pulled Paragraph 110 just as a
18 representative example of the type of conclusory analysis
19 he performed. And as an example, he identifies a function,
20 and he says: **REDACTED BY ORDER OF THE COURT**

21 **[REDACTED]**
22 **[REDACTED]**. This demonstrates -- and then
23 he just quotes the claim language. There's no actual
24 analysis, Judge. And I would submit the entire section,
25 Pages 43 through 53, are similarly conclusory.

1 Dr. Medvidovic, Samsung's expert, did a very
2 thorough review and included his analysis in his report.
3 And the crux of his analysis is in Paragraphs 58 and 59.
4 And I put some of that up on this slide here just to show
5 you the difference in the analysis he did.

6 So according to Dr. Medvidovic, the source code
7 indicates [REDACTED BY ORDER OF THE COURT]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 But don't take his word for it, Judge. He
14 identifies the exact line number and page number of the
15 source code, [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 [REDACTED] And, again, Judge, he gives you the exact portion
25 of the source code where this is done.

REDACTED BY ORDER OF THE COURT

1 [REDACTED]
2 [REDACTED] [REDACTED]
3 [REDACTED]
4 [REDACTED] [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 And then this is the source code. This appears
17 right below the paragraph. This is all in Paragraph 59 of
18 Dr. Medvidovic's report. And I'm not a source code expert,
19 but I've met with Dr. Medvidovic enough times to -- for him
20 to explain it to me. [REDACTED]

21 [REDACTED] [REDACTED]
22 [REDACTED] [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED] [REDACTED]

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[REDACTED]

THE COURT: I don't want to cut you off, Mr. Kassenoff, but this is the first of five points on one motion. We've got a lot to cover today.

MR. KASSENOFF: Yes, Judge. And to be frank, this is the most important point, because if you agree with us that the devices don't do this, we all go home. So I did want to spend a little bit of time getting into that. The rest of my points on this motion are very quick.

We'll go to Point 2. Samsung does not induce infringement. Judge -- well, you know the law as well as -- probably better than anyone else in this courtroom. What is required for inducement? Direct infringement, that Samsung, the Defendant, knowingly induced the infringement, and Samsung possesses specific intent to encourage the infringement.

There's no direct infringement because it's done in a different way, as I just explained. There's no pre-suit knowledge in this case of the patent. Uniloc agrees with that.

So at the very least, there can be no induced infringement before the complaint was filed.

And then most importantly, there's no evidence of any specific intent to encourage infringement. And, Judge, the Commil case, which was decided by the Fed Circuit and

1 affirmed on this point by the Supreme Court, says a
2 good-faith belief of non-infringement, which at the very
3 least I think we've demonstrated, tends to show that there
4 is no specific intent to encourage direct infringement.

5 The next two points are just simply a matter of
6 law, Judge. Devices cannot infringe method claims. I'm
7 not even sure why we have to argue this. That's
8 well-settled.

9 But Dr. Easttom's report alleged they could. And
10 at his deposition, we asked him: Just so I'm clear, in
11 your opinion, do the devices themselves directly infringe
12 the patent? That's one infringement scenario, correct?

13 His answer is: Yes.

14 We should get summary judgment so that doesn't
15 even come in, and that's not presented to the jury.

16 That's well-settled law. For example, from the
17 Finjan case, a person must practice all steps to infringe a
18 method.

19 Next one. Another black letter piece of law.
20 Manufacturing, offering to sell, sale, and/or importation
21 of a device cannot constitute infringement of a method
22 claim. This was taken directly from Dr. Easttom's report.
23 He says the opposite.

24 The law is clear, again, Judge. We chose one
25 Fed Circuit case. Method claims are only infringed when

1 the process is performed, not by the sale. And then right
2 around the time we were preparing our summary judgment
3 papers, the District Court of Delaware decided this exact
4 issue where a Plaintiff was alleging making, selling,
5 offering to sell, and -- and importing devices could
6 infringe a method claim. And I think it was Judge Stark, I
7 believe, said: No, as a matter of law, that's not true.

8 My last point, Judge, since we -- we are short on
9 time, is that there's no evidence that Samsung uses or
10 tests this functionality in the United States.

11 And with that, Judge, unless you have any
12 questions, we'll rest on our papers.

13 THE COURT: All right. Let me hear a response
14 from Plaintiff.

15 MR. TOLLEFSON: Thank you, Your Honor.

16 I'm Brian Tollefson. I represent Plaintiffs,
17 Uniloc.

18 I have some hard copies of the presentation. Can
19 I --

20 THE COURT: If you'd like to hand them up, that's
21 fine.

22 MS. SMITH: Your Honor, have you been having
23 issues with this monitor? It's not working.

24 THE COURT: I'm not aware of any, Ms. Smith.

25 MS. SMITH: Okay. I've pushed every button. I

1 was just curious. Should I continue poking at it or --

2 THE COURT: Are both -- are both of the monitors
3 not functioning?

4 MS. SMITH: We have one, Your Honor, which is --
5 which is sufficient. I just wanted to make sure I didn't
6 need to keep poking if you knew it was not operating.

7 THE COURT: Ms. Lockhart, why don't you look at
8 their monitor while Plaintiffs' counsel is setting up for
9 his argument?

10 MS. SMITH: Your Honor, we have -- we have one
11 monitor. I just saw an opportunity at break to --

12 THE COURT: Yeah, we'll get the IT people to check
13 it at a recess.

14 If you can make do with the one monitor instead of
15 two, let's just go forward.

16 MS. SMITH: It's up, Your Honor. Thank you.

17 THE COURT: Okay. All right. Mr. Tollefson, let
18 me hear your response.

19 MR. TOLLEFSON: Can we have the podium?

20 Thank you, Your Honor.

21 First, I'll address the issue with respect to
22 whether or not the barometers are required by the claim.
23 And then I'll get into what the products actually -- what
24 the products actually do and how they actually work, which
25 will prove infringement.

1 So Your Honor, I think, recognized that Samsung is
2 at least in part rearguing claim construction because we
3 heard here on October 16th all the same arguments. And we
4 saw in the briefing basically all the same arguments,
5 references to what the inventor said, prosecution history,
6 and the like.

7 I'm just going to illustrate here the claim and
8 then the constructions. What we see here, Claim 17, is the
9 principal and the only independent claim -- the principal
10 claim that we're talking about.

11 And what you see is that the accelerometer is
12 required for indicating motion in three directions and that
13 the accelerometer data must be used in calculating user
14 step data. But then what we see down in the calculating of
15 an incline of the wherein clause, there's nothing really
16 linking that back to the accelerometer data, unlike in
17 Claim 1, which is no longer in the case.

18 Claim 1 was the only -- is the only claim that
19 actually links back the accelerometer data to the
20 incline -- incline logic itself. So you see here in red
21 that Claim 1 requires that the incline logic utilize the
22 motion detected by the accelerometer to calculate the
23 incline, and that's just simply not present in Claim 17.

24 And Your Honor's constructions are just perfectly
25 clear. There's -- there was no requirement that the

1 calculation of the incline require the accelerometer data.

2 Now, we have another motion -- another Daubert
3 motion today directed to Samsung's expert applying this
4 incorrect construction. So there's some briefing in that
5 motion that sort of overlaps on to this issue.

6 And what Dr. Medvidovic said in his deposition is
7 that the calculation incline must be based solely on
8 accelerometer data, right? And I think that it's
9 important, Your Honor, that we -- that the claim
10 construction of 17 simply -- even if it uses the
11 accelerometer data, even if Your Honor meant in your
12 reasoning that the accelerometer data must be used in
13 calculating the incline, there's really no basis for saying
14 that it must be solely the accelerometer data.

15 And I'd like to point out that Claim 18 has
16 multiple different requirements in it that would defeat any
17 sort of claim differentiation argument that Samsung is
18 making. And namely, you've got the incline of the surface
19 and the idea that it's verification. So those extra
20 features, I would submit, would not require you to read
21 Claim 17 to exclude using a barometer.

22 Now, let me talk about how the Samsung products
23 work.

24 Okay. So Samsung's key witness, Dr. Shin, who is
25 the 30(b)(6) witness on the operation of the products,

1 explained in completely unequivocal terms how the products
2 work.

3 Each of the products includes something called a
4 pedometer, and that's a pedometer sensor that sits inside
5 the device itself, whether it's a wearable or it's a
6 smartphone. That -- that pedometer is on a sensor hub, and
7 that pedometer is always running. And inside that
8 pedometer are algorithms. And every device that has a
9 pedometer uses the same algorithms for calculating speed,
10 calories, incline, and steps. And they all use the
11 accelerometer.

12 And the accelerometer is used for all the main
13 functions of a pedometer -- that is, calculating steps,
14 speed, distance, and calories. So we know -- we know the
15 accelerometer is used.

16 Now, there's a question about whether or not the
17 accelerometer is solely used.

18 Our position is that the accelerometer data is
19 used for calculating incline, and the barometer is also
20 used. And Dr. Shin explains this in his testimony.

21 So what happens is that the accelerometer data --
22 accelerometer data is received by the pedometer, and then
23 it's processed. REDACTED BY ORDER OF THE COURT

24 [REDACTED]

25 THE COURT: It looks like a picture of snow.

1 MR. TOLLEFSON: Oh, you can't see it?

2 THE COURT: I see a couple of trees and some
3 snow --

4 MR. TOLLEFSON: Oh, I'm sorry.

5 THE COURT: -- and some clouds.

6 MR. TOLLEFSON: It's not -- it's not coming up for
7 some reason.

8 Okay. I'll just explain.

9 I don't know how to make it come up on the screen.

10 THE COURT: Now you've got Claim 17 up.

11 MR. TOLLEFSON: Right. Okay. This -- this is in
12 the briefing, and it's in Dr. Easttom's -- Dr. Easttom's
13 report. There's -- the accelerometer data comes in, and
14 what happens is the accelerometer data is processed and
15 turned into synthesized accelerometer data which represents
16 the motion of the user.

17 And when a person is walking, this motion is
18 predominantly acceleration in the up and down directions.

REDACTED BY ORDER OF THE COURT

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED] [REDACTED]
4 [REDACTED] [REDACTED]
5 [REDACTED]
6 [REDACTED] [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] [REDACTED]
12 [REDACTED]

13 And you may recall at the claim construction
14 hearing when we discussed the vertical up and vertical
15 down, I put up this slide utilizing Samsung.

16 Now, we -- we don't really agree with this slide
17 because it's not how people walk, but what's -- what we
18 illustrated here is we're talking about computing the
19 difference. And Your Honor construed that to give its
20 plain and ordinary meaning. We talked about whether it
21 really required at the time Samsung was arguing that you
22 had to measure the red arrow, measure the blue arrow, and
23 do subtraction, and Your Honor didn't include that in the
24 claim construction.

25 So you can compute the difference by computing the

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1 orange arrow or the black arrow. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 Apologize.

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

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1 [REDACTED] [REDACTED] [REDACTED]

2 [REDACTED] [REDACTED] [REDACTED]

3 [REDACTED]

4 And I'd just like to show you a timeline here so
5 we understand what's going on.

6 Sorry, Your Honor.

7 So Dr. Shin was deposed on October 3rd or October
8 1st or 2nd. I can't remember the exact date. But the
9 point being it was before claim construction.

10 And after claim construction came down, he
11 filed -- he served an errata sheet. So on October 1st, we
12 deposed Dr. Shin, and he basically admitted infringement.

13 And then on October 16th, we had the Markman
14 hearing. And then Your Honor issued your ruling on October
15 25th.

16 And then on November 5th, Dr. Shin submitted an
17 errata sheet, but he didn't change his testimony -- the
18 substance of his testimony.

19 And then we served our expert report relying on
20 Dr. Shin's testimony. And then on December 3rd, for the
21 first time, is when Dr. Medvidovic [REDACTED]

22 [REDACTED]

23 And Dr. Medvidovic basically disagrees with
24 Dr. Shin. So that's just a disputed fact. This is all
25 just genuine issues of material fact. The way that these

1 systems work is they automatically, no matter whoever turns
2 these things on, is infringing because they automatically
3 perform every step of Claim 17. And this is laid out,
4 I think, pretty clearly in the briefing.

5 So Samsung -- so the evidence shows that every
6 Samsung device with a pedometer utilizes a combination of
7 accelerometer data and -- and barometer information to
8 perform every step of Claim 17.

9 And Samsung was showing a slide of a human walking
10 up a hill, and they were saying that a step is
11 determined -- the incline is determined every time a step
12 is taken, REDACTED BY ORDER OF THE COURT
[REDACTED]

13 [REDACTED]

14 [REDACTED]

15 And that's a dispute between Samsung's expert and
16 Samsung's 30(b)(6) witness. And it's also a dispute
17 between Samsung's expert and Uniloc's expert witness who
18 testifies that it's -- [REDACTED]

19 [REDACTED]

20 So Dr. Medvidovic's expert report has a few
21 paragraphs of high-level analysis where [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 So that's just a dispute between the experts.

2 Now, with respect to inducement, Dr. Easttom,
3 Uniloc's expert's, testimony is that any user -- any user
4 of the device infringes.

5 And so there's two points that Samsung really
6 makes on this issue. And that is whether or not there's
7 direct infringement at all. And they claim that there's
8 not. REDACTED BY ORDER OF THE COURT

9 [REDACTED]
10 [REDACTED]
11 Mr. Erogbogbo's deposition testimony. He was Samsung's
12 30(b)(6) witness on a number of topics, including use.

13 [REDACTED]
14 [REDACTED] [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED] [REDACTED]
19 [REDACTED]
20 [REDACTED] So that's
21 infringement.

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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So when you run the Samsung Health app, what is happening is you are then able to view all these different metrics. You can -- you can now see your steps, you can see your calories, you can see all that stuff.

10

So if you're testing the Samsung Health app, that is another act of infringement. And because Dr. Easttom says all this stuff works automatically, just -- just the act of testing it itself is good evidence of infringement.

14

THE COURT: Does Dr. Easttom supply any specific information to support this conclusory statement that they automatically work automatically every time you turn the phone on, or is it just I know it because I'm experienced, and I know how this testing works?

19

MR. TOLLEFSON: So what Dr. Easttom did is he analyzed the source code. He used a forensic tool. And Dr. Medvidovic didn't use any forensic tools. He used a forensic tool that's used by the FBI, NSA, and NASA, and so forth. And he ran all these traces. And then he looked at the code, and then he looked at Dr. Shin's testimony.

25

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED] So his testimony is
4 consistent with Dr. Easttom's testimony.

5 So Dr. Easttom's testimony was based on his review
6 of the code. He believes that it's always on based on his
7 review of the code.

8 And also his review of Dr. Shin's testimony where
9 Dr. Shin talks about how the pedometer sensor hub works.
10 And Dr. Shin gets into -- gets into the weeds on it. He
11 says [REDACTED] [REDACTED]

12 [REDACTED]
13 [REDACTED]

14 THE COURT: There seems to me in the briefing to
15 be some distinction between what Dr. Easttom says in his
16 report and what he says in his deposition testimony.

17 Now, he says in his deposition testimony: [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED] But that's no deposition.

21 That's not in his report. And he's not going to testify at
22 trial outside of his report.

23 MR. TOLLEFSON: I understand that.

24 THE COURT: So how do you get around the issue
25 that some of this confirmation that you're talking about

1 exists outside of his written report that he's going to be
2 permitted to opine and testify directly on at trial?

3 MR. TOLLEFSON: Dr. Easttom provides dozens of
4 paragraphs with an explanation about how the products
5 perform each and every step of the claim automatically.
6 And that's based on his review of the code and his review
7 of the other -- other evidence in the record.

8 THE COURT: All right.

9 MR. TOLLEFSON: But Dr. Medvidovic's testimony is
10 basically limited to saying that the Samsung Health app
11 requires a user to accept the terms and conditions. But
12 the Samsung Health app is different. It's -- you don't
13 need the Samsung Health app to infringe. The Samsung
14 Health app is another layer.

15 THE COURT: Let me hear the rest of your argument.

16 MR. TOLLEFSON: Yeah. So with respect to
17 inducement, there is direct infringement. There's evidence
18 of direct infringement.

19 And Sam -- Samsung sells its phones and provides
20 paperwork with those phones on how to use them -- use the
21 phones. It provides on their websites instructions for how
22 to use their phones. It provides instructions for how to
23 use the S Health app. There's millions of users of the
24 Samsung Health -- S Health app. So you know that there's
25 millions of people in the United States that are not only

1 carrying around Samsung phones, which would be
2 infringement, but also they're using the specific
3 functionality on a daily basis, registered with Samsung,
4 uploading and storing the data server, whatnot.

5 So there's -- there's evidence in the record that
6 Samsung encourages its customers to use the phones in an
7 infringing manner.

8 Moreover, there's evidence in the record that
9 Samsung tests and -- and trains its sales reps. So
10 Mr. Erogbogbo talked about training, and that they train
11 their sales reps. And there's documentation -- Samsung
12 documents that talk about training their sales reps in the
13 S Health area. So all the acts are evidence that could be
14 used to prove -- to prove induced infringement.

15 Moreover, in our papers, we cited to some case law
16 that supports the fact that Samsung designs -- these
17 products could also be evidence of inducement. They --
18 their 30(b)(6) witness testified that [REDACTED BY ORDER OF THE COURT]

19 [REDACTED]

20 [REDACTED]

21 THE COURT: Pull the microphone a little closer or
22 speak up --

23 MR. TOLLEFSON: Sorry, Your Honor.

24 THE COURT: -- please, sir.

25 MR. TOLLEFSON: Also, Samsung is arguing that they

1 have a good-faith basis that they don't infringe, however,
2 they haven't provided in their briefing exactly when they
3 determine this good-faith basis -- you know, what their
4 arguments are.

5 So based on the record, it appears that their
6 good-faith basis starts with REDACTED BY ORDER OF THE COURT

7
8 So if -- if Your Honor even were to rule that they
9 had a good-faith basis, I think that the time period would
10 be from December 3rd, 2018, onward, not from the time that
11 the infringement action was brought.

12 Now, as -- as far as the other points that Samsung
13 made with respect to infringing a method by sales, their
14 briefing is confusing. I'm not really sure what they're
15 trying to accomplish with that portion of their motion.

16 Uniloc has pled and intends to try indirect
17 infringement by contributory infringement, which would be
18 directed to sales. That's indirect infringement, not under
19 271(a).

20 Now, under 271(a), there could be other
21 theories -- legal theories of infringement that Samsung
22 infringes such as under the SiRF Tech. case through
23 vicarious liability and divided infringement.

24 So under those theories of infringement, the
25 devices themselves -- the devices themselves perform these

1 steps automatically.

2 So under SiRF Tech., you've got a situation where
3 even though a user is holding a device, the liability is
4 attached to the -- to the company that -- that created the
5 device because of the automatic steps that are performed.

6 So I just -- I don't know -- I don't know exactly
7 what they're trying -- what they're trying to accomplish
8 with that. I think that those -- those points would be
9 better served with jury instructions at trial versus some
10 sort of tiny partial summary judgment on -- on sales or
11 something like that. The sales will come in from divided
12 infringement and from contributory infringement.

13 THE COURT: Well, it's clear that -- it's clear
14 that the Plaintiff is pursuing indirect infringement claims
15 that focus on and emanate from the consuming public's
16 purchasing -- the purchasing public's use of these devices.

17 Focus if -- focus for a moment, if you will, in
18 your argument about Plaintiffs' position on direct
19 infringement alleged against Samsung for their own acts, as
20 opposed to the indirect infringement that you've already
21 mentioned.

22 MR. TOLLEFSON: You're asking me, Your Honor,
23 which acts cause direct infringement?

24 THE COURT: I'm asking for you -- I'm asking you
25 to crystallize for me in a sentence or two why you think

1 there is a viable theory for Plaintiff to pursue as to
2 direct infringement alleged against Samsung for its own
3 acts.

4 MR. TOLLEFSON: I understand.

5 Direct infringement is committed by Samsung's use
6 of their own devices, the use of their devices in multiple
7 ways. Testing, training, and then they also use their
8 devices under a theory of divided infringement because the
9 devices themselves perform each and every step
10 automatically. So that would be under the SiRF Tech. case.

11 THE COURT: And is this designing and testing that
12 happens inside the United States, as opposed to designing
13 and testing that happens outside the United States?

14 MR. TOLLEFSON: Well, certainly there's designing
15 and testing that occurs in both the United States and
16 Korea. There are three different kinds of tests that are
17 performed in the United States. And two of those tests are
18 directed to the fitness tracker, which is what we're
19 talking about here in this case. So, yes, in the United
20 States.

21 THE COURT: Well, what prompts my question is an
22 argument in Defendants' briefing where they say that
23 Plaintiff has no evidence that any Samsung employee has
24 actually performed all the claimed method steps in the
25 United State -- United States as a part of their job

1 function.

2 MR. TOLLEFSON: Okay.

3 THE COURT: That's what I'd like you to focus on.

4 MR. TOLLEFSON: Okay.

5 THE COURT: Because apparently, your counter to
6 that is Dr. Easttom says his experience is extensive and
7 common sense and knowledge of corporations tells you that
8 that happens.

9 But there doesn't seem to be any particular this
10 is why it happens, this is how a Samsung employee performs
11 each step of a method in the United States.

12 MR. TOLLEFSON: All right. Well -- so Dr. Easttom
13 submitted an affidavit, which was filed with the Court with
14 our sur-reply where he clarified and commented on Dr. --
15 Mr. Erogbogbo's testimony on testing.

16 THE COURT: And I know that the Shin errata and
17 the Easttom affidavit -- I mean, these have just been
18 filed, and there hasn't been -- there hasn't been an
19 opportunity to respond to them. So I don't know how it's
20 properly briefed and before me for argument today.

21 MR. TOLLEFSON: Okay.

22 THE COURT: I mean, you can certainly reference
23 it, but I don't think either side can expect me to dispose
24 of that today without the responding party having an
25 opportunity to file a response.

1 MR. TOLLEFSON: I understand, Your Honor.

2 Mr. Erogbogbo was Samsung's 30(b)(6) witness on
3 use.

4 THE COURT: And they asked him if he had used
5 this?

6 MR. TOLLEFSON: Yeah. Well, he used it.

7 And Mr. Diaz, another 30(b)(6) witness, disclosed
8 that he used it. I mean, there's probably people in this
9 room that are using it right now.

10 However, he testified and named an actual
11 individual who heads up the user testing in the United
12 States. So he testified -- he named a person who works for
13 Samsung whose responsibility it is to test the pedometer
14 functionality in the United States.

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15 So Samsung admits at least that

16

17

18 THE COURT: And does Dr. Easttom address this in
19 his expert report, or is this, again, a deposition or an
20 affidavit or some source of information outside his expert
21 report which there's been no motion for me to grant leave
22 to amend. And without that, there's not going to be any
23 testimony in this trial before this jury that comes from
24 outside of that expert's report.

25 MR. TOLLEFSON: Well, there will be the testimony

1 of -- this is a party admission, so this will come in under
2 Rule 32, and we'll read that in open court.

3 Your answer is that -- my answer to your question,
4 however, Your Honor, is that Dr. Easttom did not directly
5 address Mr. Erogbogbo's testimony in his expert report. He
6 addressed it in the affidavit.

7 THE COURT: That's the way it appears to me.

8 MR. TOLLEFSON: Yes, sir.

9 THE COURT: All right. What else do you have for
10 me on this motion, counsel?

11 MR. TOLLEFSON: Just one minor point.

12 Samsung claims that if a device doesn't have a
13 barometer, it should be out. But Dr. Shin's testimony
14 is -- goes directly to the heart of this issue, and he lays
15 out -- and this is in our briefing -- in clear terms that

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16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 THE COURT: All right. I'll give the Defendants a
25 brief rebuttal, and then we'll see where we are.

1 MR. KASSENOFF: Judge, to be honest, I'm not a
2 hundred percent sure where to start. I heard a lot of
3 things today for the first time. I heard the concept of
4 vicarious liability. I heard the concept of divided
5 infringement. Neither of those are in the infringement
6 contentions. Neither of those are in the untimely amended
7 infringement contentions, which one of my colleagues will
8 address later today. Frankly, I'm not even sure those are
9 appropriate in the case.

10 Contributory infringement, it was pled in the
11 complaint. I admit that, or I concede that. Again, not in
12 the infringement contentions, not in the untimely amended
13 infringement contentions.

14 We asked Dr. Easttom: Do you have an opinion on
15 contributory infringement?

16 He said: No.

17 We didn't even know it was still in the case until
18 the -- the Plaintiffs tried to put it into the jury
19 instructions, which is a big dispute we have, and we'll
20 hear from Mr. Edlin about contributory infringement later
21 today.

22 Your Honor, you hit -- you hit one of the key
23 points about lack of use by Samsung. Dr. Easttom did not
24 rely on Mr. Erogbogbo's deposition testimony.

25 What Mr. Tollefson said is he didn't directly

1 address it. I mean, let's call a spade a spade. He didn't
2 address it at all. They realized the problem with that, so
3 they put in this affidavit trying to sneak it in.

4 But it doesn't even matter. I'm going to read to
5 you two questions and answers from Mr. Erogbogbo's
6 deposition testimony, which is on Page 8 of our reply
7 brief.

8 THE COURT: Let me stop you a second.

9 Now, I'm getting confused. I don't have anything
10 before me that I'm aware of, unless I've had a lapse of
11 memory, about untimely amended infringement contentions --
12 contentions before the Court today.

13 MR. KASSENOFF: Respectfully, Judge, we -- we
14 moved to strike their Doctrine of Equivalents arguments,
15 which were included in untimely amended infringement
16 contentions. That was the name of the motion.

17 THE COURT: That's where -- that's where that
18 comes in?

19 MR. KASSENOFF: Correct, Your Honor.

20 THE COURT: All right.

21 MR. KASSENOFF: Going back to Page 8 of our reply
22 brief, question and answer of Mr. Erogbogbo --
23 Mr. Erogbogbo.

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13 At the deposition, Uniloc's counsel asked
14 Mr. Erogbogbo if he personally ever used the pedometer
15 function. He said he did at some point in the past.

16 They didn't ask him was that part of your job
17 functioning as a marketing executive at Samsung. They
18 didn't ask him that question. They didn't ask him, what
19 product did you use? Was it one of the accused products?
20 Was it one that can't infringe because it doesn't have a
21 barometer? Was it done before the patent was issued?

22 There was no follow-up. The use of one person of
23 an unnamed product with an unnamed functionality that
24 doesn't even calculate the incline as required by Claim 17
25 cannot suffice.

Another point, Judge, was this -- this automatic

1 calculation of the incline. And Mr. Tollefson relied on
2 the SiRF Tech. case.

3 Now, Judge, I would point out the
4 Ericsson v. D-Link case, which was Fed Circuit 2014,
5 substantially after the SiRF case, and in that -- in the
6 Ericsson case, the patentee made a similar argument, that
7 it was done automatically, the method, then the sale of a
8 product can't infringe, along the lines of what the
9 Plaintiff is arguing here. And what the -- Ericsson argued
10 was SiRF -- SiRF. And what did the Fed Circuit say? They
11 said: No, SiRF is distinguishable because in SiRF, the
12 manufacturer of the GPS checks, they still perform several
13 of the steps because they're done on their own satellites
14 and servers. So the fact that the customer does the last
15 step doesn't matter. As the -- as the component
16 manufacturer, you can still directly infringe.

17 But what the Fed Circuit said in Ericsson, they
18 cited a whole long string of cases, including RICO, Akamai,
19 and Lucent, and they said: Our other decisions echo the
20 idea from RICO that the direct infringer must actually
21 perform the steps in the method claim.

22 And that's how the Fed Circuit came out in
23 Ericsson. And we don't do that. The fact that customers
24 may do it, they can go after us for induced infringement.
25 That doesn't make the sale of the product a direct

1 infringement by Samsung.

2 Another point on this automatic notion, there's no
3 testimony or there's nothing in the report from Dr. Easttom
4 that says it's automatic or explains why it's automatic.

5 They said that Dr. Shin said that. I -- I
6 defended Dr. Shin's deposition. I've read his transcript
7 many times. I didn't see anything about that.

8 The only evidence that I've seen is from
9 Dr. Medvidovic who said he walked around with one of the
10 accused phones without accepting the terms and conditions
11 of the Health app, and nothing was recorded. That's the
12 evidence that I saw.

13 Going back to some of the other arguments that the
14 Plaintiff made today.

15 Mr. Tollefson argued -- he pointed out in
16 Claim 17 that the receiving data talks about accelerometer
17 and the calculating talks about the accelerometer. But the
18 incline, there's nothing in here about accelerometer.

19 So what? If you look at the specification, which
20 is the description of the invention by the patentee, he's
21 explaining the identification vertical up and down is done
22 with the accelerometer data.

23 Conversely, he's explaining that the altimeter
24 works on the change in altitude. It doesn't matter that
25 the words "accelerometer" don't appear in that step.

1 Mr. Tollefson also said that this isn't a claim
2 differentiation situation. I agree. It's not claim
3 differentiation. It's what the patent and what the
4 inventors taught and disclosed.

5 Mr. Tollefson mentioned Dr. Shin. He was one of
6 the lead engineers at Samsung on this product. And it may
7 have been a misstatement, but Mr. Tollefson said that
8 REDACTED BY ORDER OF THE COURT

9 REDACTED
10 REDACTED
11 Dr. Shin never said anything like that. I'm going
12 to pull up what he actually said, which was on one of the
13 Plaintiffs' slides.

14 Here's -- here's the original transcript. And,
15 Judge, you have to understand, Dr. Shin, he's a Korean
16 engineer, Ph.D., very smart, does not speak very much
17 English. When I spoke to him, I had -- every time I speak
18 to him, I have to communicate through a translator. His
19 English is not good at all.

20 He was asked a somewhat confusing question: REDACTED

21 REDACTED
22 REDACTED
23 REDACTED
24 REDACTED
25 REDACTED

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1 [REDACTED] [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 But the problem, Judge, was that's a confusing
7 question for me, and I'm a native English speaker. For
8 Dr. Shin, hearing that question through a translator, it
9 was confusing, which is what he said. It's rather long and
10 confusing. It was reinterpreted. And he did answer it,
11 but then upon further reflection, he put in an errata and
12 he explained it: [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 Now, this is one of the unfortunatecies, Judge, of
19 the Korean language. There's no "a" or "the" in Korean, so
20 when Dr. Shin put that in an errata, he didn't understand
21 that in English [REDACTED]

22 [REDACTED] Those

23 words don't exist in Korean. And when that was explained
24 to him, he did put in a second errata to clarify. It's not
25 what you would in English call [REDACTED] [REDACTED]

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But it doesn't even matter, Judge, for a number of reasons.

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First, everything that Samsung does, all this, is still not identifying vertical up and vertical down and computing a difference. So this is all a red herring.

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More importantly, even if we're going to say, you know what, Dr. Shin, we're holding you to what you said originally, we're not going to let you do any erratas, despite the language barrier, despite everything,

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Mr. Tollefson made a -- a big point of saying the Samsung devices use the accelerometer data for all these things, calculating steps, speed, distance, calories. We don't dispute that. We have an accelerometer. We do a lot with the accelerometer. That's not what the claim requires. The claim requires a calculation of the incline. And that is done with the barometer.

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THE COURT: Have you got anything additionally that responds directly to Plaintiffs' arguments, because you've lapsed back into your original arguments again now?

23

24

MR. KASSENOFF: I apologize, Judge. I was trying to respond to specific points.

25

On the inducement point, Judge, where Plaintiff --

1 Plaintiff argued that the good-faith belief only started on
2 December 3rd when we served our expert report, I've never
3 seen law that says that good-faith belief starts when you
4 serve an expert report. I assure you, when Samsung gets
5 sued with a patent -- in a patent case, they immediately
6 analyze the complaint, like most companies do. They form
7 good-faith beliefs and non-infringement defenses early on
8 in the case.

9 We started working with an expert early on in the
10 case. The good-faith belief was from the moment or shortly
11 after they got notice of the patent. And there's no
12 evidence of the lack of good-faith belief. There's no
13 evidence of any intent to induce.

14 Judge, I think I've addressed -- oh, one last
15 point, Judge. Another one of the new arguments that
16 Plaintiff made, this concept of the devices, some of the
17 watches, the wearables do not have a barometer, which is
18 the exact component that Dr. Easttom identified as
19 performing the incline calculation. And it's our view, how
20 can those possibly infringe under their view. And they've
21 come up with a new argument, REDACTED BY ORDER OF THE COURT

22 [REDACTED]
23 Whether or not that's true or not, it's nowhere in their
24 infringement contentions. It's nowhere in their amended
25 infringement contentions. It's nowhere in Dr. Easttom's

1 report, and nowhere is it in Dr. Easttom's improper
2 affidavit that he submitted about a month ago.

3 So unless Your Honor has any further questions.

4 THE COURT: No, no. Thank you.

5 It's a quarter to 12:00, counsel. We're going to
6 break until 12:15. I don't know if that's long enough for
7 you all to get lunch or not. But we're traveling at such a
8 slow pace this morning, we can't afford to take a longer
9 break than that and hope to get done what we need to get
10 done today. We'll reconvene at 12:15.

11 The Court stands in recess.

12 COURT SECURITY OFFICER: All rise.

13 (Recess.)

14 COURT SECURITY OFFICER: All rise.

15 THE COURT: Be seated, please.

16 Counsel, I'm sorry I took longer than I told you,
17 but I spent the time carefully reviewing this motion for
18 summary judgment that you've argued, as well as the
19 supporting briefing over the break.

20 And I'm prepared to give you the Court's ruling on
21 the Defendants' motion for summary judgment.

22 The Court agrees with the Defendants that the
23 accused devices on their own cannot infringe the asserted
24 method claims. A device sitting by itself does not
25 infringe a method claim. But a method claim -- there must

1 be performance of each and every step of the method claim.

2 Now, as to Plaintiffs' assertions of direct
3 infringement against Samsung, the Court finds that there is
4 no sufficient summary judgment evidence that Samsung itself
5 performs each and every step of the method claims asserted
6 in this case in the United States. And I'm going to grant
7 summary judgment for the Defendants on Plaintiffs' direct
8 infringement claims.

9 As to Plaintiffs' indirect infringement claims
10 asserting that third parties perform each and every step of
11 the asserted method claims within the United States, the
12 Court finds that is a disputed issue with supportive
13 summary judgment evidence on the side of Plaintiffs to put
14 this issue squarely before a factfinder in the context of a
15 jury trial. Therefore, I'm going to deny the Defendants'
16 motion for summary judgment with regard to Plaintiffs'
17 assertions of indirect infringement.

18 Now, having granted the motion for summary
19 judgment in part, as I've described to you, particularly
20 with regard to the Plaintiffs' direct infringement claims
21 against the Defendants, the Court is aware that the
22 Plaintiffs' damages expert makes no distinction between the
23 direct infringement claims and the indirect infringement
24 claims.

25 The Court's also aware that indirect infringement

1 claims cannot precede the filing of the case. That
2 consequently disposes of the marking issue in the Court's
3 view. But it requires the Court to afford some reasonable
4 opportunity for Plaintiffs to amend their damages report in
5 light of the Court's ruling on summary judgment motion.

6 Now, there's not an excessive amount of time
7 between now and the trial date to do that, but the Court is
8 persuaded there is an adequate amount of time for that to
9 occur. Consequently, I'm going to order that Plaintiffs
10 amend their damages report in the following fashion:

11 Plaintiffs' amended damages report will be
12 produced and served by March the 8th, 2019.

13 Defendants' damages expert will produce and serve
14 a rebuttal to that amended damages report by March the
15 11th.

16 Depositions of the -- depositions by the Defendant
17 of the Plaintiffs' amended damages report deposing the
18 Plaintiffs' damages expert on his amended report and
19 Plaintiffs' deposition of the Defendants' damages expert on
20 his rebuttal report responding to the amended report will
21 take place on March the 14th.

22 Subsequent to those depositions, Daubert motions,
23 if any, as to the amended report from Defendants and as to
24 the rebuttal report from Plaintiffs will be due by
25 March the 18th. Responses to such Daubert motions in both

1 directions will be due by March the 21st.

2 And the Court will consider and rule on those
3 matters at the second pre-trial on March the 26th.

4 Now, having said what I've said, I'm going to give
5 both sides a brief break of approximately 15 minutes to
6 absorb what I have said, meet and confer with each other,
7 discuss the same with their corporate representatives, to
8 the extent they're available, and then in 15 minutes,
9 I want to see counsel in chambers so that we can discuss
10 the most profitable use of the remainder of our time today
11 in light of the ruling that I've just given you.

12 With that, the Court stands in recess.

13 COURT SECURITY OFFICER: All rise.

14 (Recess.)

15 COURT SECURITY OFFICER: All rise.

16 THE COURT: Be seated.

17 All right. Counsel, let's go forward with the
18 Daubert motion on Mr. Easttom urged by Defendant, Samsung.
19 Let me hear Samsung's argument from the podium.

20 MR. EDLIN: Thank you, Your Honor. Richard Edlin
21 of Greenberg Traurig for Samsung.

22 Your Honor, much of your decision today disposed
23 of much of the argument that we were going to make on -- on
24 Dr. Easttom. But let me just draw your attention to two
25 paragraphs from his report, and the issue that I want to

1 talk about is whether or not Dr. Easttom could testify that
2 the accused devices actually infringe on the patent.

3 Now, as we all know, under 702, in order for an
4 expert to properly give his opinion to the jury, it has to
5 be based on sufficient facts and data, reliable principles,
6 and then a reliable application of those principles.

7 Let's take a look at -- at the paragraph that my
8 partner, Mr. Kassenoff, put up this morning, and that's
9 Paragraph 110. And that's in front of Your Honor on the
10 screen.

11 Now, all that happens in Paragraph 110 is he
12 identifies a function, and then he said this demonstrates,
13 and then he puts into -- into quotes the language from the
14 claim.

15 And if Your Honor will just take a look at the
16 first part of Paragraph 110, I think you will take my point
17 on that. There has been no analysis. There has been no
18 methodology. There has been no description of what
19 Dr. Easttom did to come to this conclusion.

20 He says: Let me identify the
21 REDACTED BY ORDER OF THE COURT

22 [REDACTED] And then he simply says that
23 demonstrates, and he quotes the language from the patent.

24 Now, that can't possibly serve to qualify as
25 expert testimony.

And I'll let Your Honor take a moment and just

1 take a look at that.

2 THE COURT: I've seen it.

3 MR. EDLIN: Similarly, let's look above at
4 Paragraph 109, and he outlines another function. And
5 simply looking at a diagram, he says: REDACTED BY ORDER OF THE COURT

6 [REDACTED]
7 All you have to do is look at the diagram in order to do
8 that. It says: [REDACTED]

9 [REDACTED]

10 How? How does it do that? There is no
11 demonstration of anything in that report that would let
12 anybody know how that happened. It is at most a mere
13 conclusion.

14 Let's take a look at the next sentence. Then
15 other functions related to a single step are called. Well,
16 which other functions relating to the single step? How are
17 they called? How do they interact?

18 There is just nothing in the short analysis of
19 this code, Your Honor, that in any way would allow anybody
20 to see the methodology between how a vertical step up and a
21 vertical step down and the measurement between those two
22 are correlated.

23 So I think, Your Honor, in the absence of any
24 analysis, and we could go through the rest of these pages,
25 but the problem is endemic to the entire analysis. All of

1 these paragraphs -- we picked these two. You could pick
2 any one you wanted, and there would be nothing that would
3 describe how that was done.

4 Now, when we come to Mr. -- Dr. Medvidovic's
5 report, Mr. Kassenoff will walk you through in great
6 specificity Dr. Medvidovic's explanations. He does apply
7 scientific method. He does analyze facts. He does
8 establish how things work together. It's just simply
9 absent from Dr. Easttom's report.

10 For that reason, Your Honor, and because I think
11 that's the only thing left that Dr. Easttom really could
12 testify to, we believe that his entire report at this point
13 should be stricken, and he not allowed -- not be allowed to
14 testify.

15 THE COURT: Let me hear Plaintiffs' response,
16 please.

17 Whenever you're ready, Mr. Tollefson.

18 MR. TOLLEFSON: Thank you, Your Honor.

19 I didn't take their Daubert motion of Dr. Easttom
20 to be a request to strike the entire report based on
21 Paragraphs 109, 110, and 111. I -- I'm actually a little
22 surprised here.

23 Dr. Easttom, in his report, walks -- walks through
24 and discusses at great length both the code and his traces
25 of the code, which are evidence.

1 So he ran the code through some highly technical
2 equipment that's used by the FBI and -- and other
3 organizations for forensic computer analyses. And he
4 determined that everything is triggered on this program
5 called detect step. And there's a number of drawings. He
6 -- he showed one drawing -- he showed one drawing on Page
7 45 where you have [REDACTED BY ORDER OF THE COURT]

8 So we discussed earlier today about step pattern
9 which Dr. Easttom analyzed from Samsung documents and from
10 Dr. Shin's testimony. And what Dr. Easttom does is provide
11 further additional evidence that Dr. Medvidovic never
12 addresses.

13 So, for example, at Paragraph 118, Dr. Easttom
14 shows [REDACTED]

15 [REDACTED] And then he discusses at
16 length what happens.

17 And so these computer traces are important.
18 I don't know how Samsung can take the position that
19 computer traces and forensic -- the application of forensic
20 technology -- I mean, Dr. Easttom is a computer specialist
21 with a forensic background. He teaches classes -- he
22 teaches classes -- classes, excuse me, in forensic computer
23 investigation. This is what he does.

24 So in addition to looking at the code, he did
25 stuff that Dr. Medvidovic didn't do. And so these traces

1 are evidence, and this is precisely the kind of evidence
2 that a jury should be able to hear.

3 Now, Dr. Easttom also performed experiments, and
4 he used the phone in the normal fashion. As he states in
5 Paragraphs 168, 185, 186, he looked at the code review and
6 analysis, he looked at Dr. Shin and Ms. Park's testimony.

7 And if we look at Paragraphs 87 through a hundred
8 or so, he walks through the information regarding the
9 accelerometer coming in. And he explains, like, for
10 example, in Paragraph 88, precisely how the motion is
11 detected and a step pattern is created where the pedometer
12 is walking through and looking at the -- it's actually the
13 change in acceleration, walking through the acceleration
14 pattern and determining when a step is taken. And that
15 shows you the vertical up and the vertical down, and it
16 shows you precisely when **REDACTED BY ORDER OF THE COURT**

17 **[REDACTED]**
18 **[REDACTED]** **[REDACTED]**
19 **[REDACTED]** **[REDACTED]**
20 **[REDACTED]** So
21 this is all evidence that should come in before the jury,
22 and it's scientific evidence.

23 THE COURT: Let me do this. Let me see if I can
24 restore a little structure to our argument here.

25 The motion, as presented by Defendants, calls out

1 several discrete issues that I think we would be well
2 served by referring to.

3 The first one, as I read the motion and the
4 related briefing, is whether Dr. Easttom failed to apply
5 the correct legal standard or identify a direct infringer.

6 That probably is rendered moot by the Court's
7 ruling on partial summary judgment. He's not going to be
8 testifying about direct infringement or the proper legal
9 standard or identifying a direct infringer, at least as to
10 any theory of direct infringement asserted against Samsung,
11 because I granted summary judgment on that.

12 Now, the second issue called out in the motion is
13 whether his opinions regarding induced infringement are
14 reliable, conclusory. That's certainly something to be
15 argued about now.

16 The third issue called out in the motion is
17 whether the report is based on a material incorrect factual
18 assumption. And this relates, I think, to the accused
19 products. This may be getting back to the same issue I
20 heard about earlier today.

21 MR. TOLLEFSON: That issue has to relate to
22 whether the products are different as between the products.

23 THE COURT: Right. And then the fourth issue
24 deals with his Doctrine of Equivalents analysis.

25 And the fifth issue in the motion deals with his

1 anticipation and obviousness standards, whether they should
2 be stricken.

3 And then, lastly, there's a section of his report
4 challenged as relates to his enablement opinions.

5 That's what the motion calls for. So I'm happy to
6 hear argument on the remaining and live portions of those
7 six issues as called out in the motion. Looks to me like
8 Issue 1 may have been effectively disposed of by the
9 Court's earlier ruling, but I'm not sure whether the others
10 are.

11 So perhaps we would be better served by focusing
12 on those Issues 2 through 6 in the briefing, rather than
13 trying to do some high level in light of this -- this is
14 in, in light of this, this is out kind of analysis here.
15 So --

16 MR. TOLLEFSON: Your Honor, I was just trying to
17 address Mr. Edlin's argument --

18 THE COURT: I'm -- I'm speaking to both sides.
19 Because, in effect, what the Plaintiffs -- excuse me, what
20 the Defendants just got up there and said is the entire
21 report should be stricken, which that's not the motion.

22 Part of -- part of the challenge the Court's had
23 with the hearing today is the argument seems to be
24 untethered to the briefing in large part, and both sides
25 seem to be wandering in and out of various issues that

1 might be issued -- might be mentioned in the briefing. But
2 to the extent both sides can bring a little more focus to
3 bear, I think the Court would be better -- better served.

4 So -- and I certainly want to afford the
5 Plaintiffs a full opportunity to respond to Defendants'
6 argument, but maybe we need to reset the process, and let
7 me hear argument about these discrete issues that are
8 called out in the briefing.

9 I'm satisfied that Issue 1 is effectively disposed
10 of by my prior ruling. But I'd like to hear about the
11 argument on whether Dr. Easttom's opinions regarding
12 induced infringement are conclusory and unreliable. That's
13 perhaps one of the more important parts of Defendants'
14 motion, in light of what's left in the case.

15 Why don't you tell me -- Mr. Tollefson, why don't
16 you tell me why they are reliable, why they're not
17 conclusory, why they shouldn't fall in a Daubert analysis,
18 focusing on his opinions regarding induced infringement?

19 MR. TOLLEFSON: Okay, Your Honor.

20 So Dr. -- Dr. Easttom's a computer forensic
21 specialist. He's an expert -- a computer expert, not a law
22 expert. And Dr. Easttom has analyzed the code and analyzed
23 the testimony and analyzed the documents, and he's
24 concluded through his analysis that -- that the products
25 themselves, that any user of the products would infringe.

1 So in Paragraph 80 -- 187, after going through
2 dozens of pages of analysis, he concludes that any user of
3 the accused Samsung products infringes.

4 So with respect to a claim for inducement, Samsung
5 is fully aware of the patent and the allegations of
6 infringement against it, at least since the date of the
7 complaint. Then there must be a proof of direct
8 infringement which we believe we'll be able to prove at
9 trial.

10 And then with respect to Dr. Easttom, his
11 testimony is going to be that any user will infringe the
12 claim. So induced infringement is that Samsung
13 encourages -- encourages its customers, which they
14 certainly did encourage their customers, to use its
15 products. They sell them, hoping that their customers use
16 the products. And they provide documentation that
17 encourages their customers to use the products.

18 And since Dr. Easttom's testimony is directly to
19 the point that the customers -- any use of the customers of
20 Samsung's devices infringes the products, then, therefore,
21 the testimony should come in on inducement.

22 THE COURT: All right. Anything else on that
23 point you want to argue to me?

24 MR. TOLLEFSON: No, Your Honor.

25 THE COURT: Does the Defendant want to join issue

1 on that particular point?

2 MR. EDLIN: Yes, Your Honor.

3 THE COURT: Then let me hear some targeted
4 argument on that point.

5 MR. EDLIN: May I do it from here, Your Honor?

6 THE COURT: No, you need to go to the podium.

7 MR. EDLIN: Thank you, Your Honor.

8 Your Honor, with respect to the induced
9 infringement, let me just respond first to the issue about
10 customers. There's nothing in Dr. Easttom's report about
11 customers. He couldn't testify to the manuals or training
12 or anything of that sort. Nothing is there. So there's
13 nothing for him to say about that.

14 He doesn't discuss two of the most important
15 elements of induced infringement, one, that Samsung was
16 aware of the '556 patent or that it had any intent that its
17 users in any way violate a patent that it knew that its
18 users did infringe.

19 Samsung has a very good-faith belief that it's
20 acting appropriately. But with respect to the specifics,
21 Your Honor, I believe those three points -- one that was
22 directed at customers that were just -- as I just said, are
23 not in the report, and two of the important elements are
24 not even considered or analyzed by Dr. Easttom, I think,
25 Your Honor, renders his inducement testimony merely

1 conclusory.

2 THE COURT: All right.

3 MR. EDLIN: Thank you, Your Honor.

4 THE COURT: Plaintiff want to respond to that any
5 further?

6 MR. TOLLEFSON: No, Your Honor.

7 THE COURT: Then let's move on to the next issue,
8 whether Dr. Easttom's infringement report is based on
9 materially incorrect factual assumptions.

10 I'll hear from Defendant first.

11 MR. EDLIN: Your Honor, most importantly on this,
12 there are 43 accused products. For 42 of those products,
13 he does absolutely no analysis as to whether or not, for
14 example, they contain a barometer.

15 Now, Dr. Easttom says that the barometer is the
16 infringing component of the Sam -- of the accused devices,
17 and he does absolutely no analysis of that. And, in fact,
18 in his deposition, when it was pointed out to him that some
19 of the other products do use a barometer -- do not use a
20 barometer, his response was: Well, if that's what you're
21 saying, then maybe I need to amend my report.

22 So with respect to those facts, Your Honor, he
23 just has not done a proper analysis. And, in fact, his
24 assumptions are incorrect. We think that's the gist.

25 Thank you, Your Honor.

1 THE COURT: What's Plaintiffs' rebuttal?

2 MR. TOLLEFSON: Your Honor, in Dr. Easttom's
3 report, he explains that [REDACTED BY ORDER OF THE COURT]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 Now, Samsung's 30(b)(6) witnesses have also
11 confirmed that [REDACTED]

12 [REDACTED]

13 Dr. Easttom reviewed the testimony of that, and
14 based on his review of the code and the review of the
15 testimony, he [REDACTED]
16 [REDACTED] That's in
17 Paragraphs 44 and 45 of the Easttom report.

18 So his expert report is reliable on that issue...

19 THE COURT: All right. Anything else?

20 MR. TOLLEFSON: No, Your Honor.

21 THE COURT: Now, the next issue, as I read it in
22 the motion, is related to whether Dr. Easttom's DOE
23 analysis should be stricken. And let me hear from the
24 Defendant on this. I know we have a separate motion
25 regarding DOE, but let me hear about this portion of the

1 Daubert motion.

2 MR. EDLIN: Yes, Your Honor. I won't repeat what
3 probably will be the balance of the DOE, but with respect
4 to this, the disclosure dedication rule is violated here by
5 Dr. Easttom.

6 Now, the Court in its Markman order noted that
7 although the patent disclosed but did not claim multiple
8 steps, the fact of the matter is that Claim 17 is a single
9 step. And so there is an obvious difference between those
10 two which Dr. Easttom gets wrong when he says that there is
11 an insubstantial difference between those two.

12 So to say that another way, the Court's Markman
13 order requires a single step. That means that multiple
14 steps, two steps, three steps, six steps, by definition,
15 would be materially different. Otherwise, the Court would
16 have issued a different Markman order.

17 And when Dr. Easttom says that those two things
18 are insubstantially different, that's where that analysis
19 falls apart, Your Honor.

20 So in that regard, with respect to his report,
21 Your Honor, I think that -- that he can't go forward in
22 calling those two things insubstantially different. It
23 would in -- in effect, it's violative of the Court's
24 analysis under the Markman.

25 THE COURT: So you're disagreeing with his

1 analysis as to what's insubstantial, but you're not telling
2 me there's -- the door has been opened or there's some
3 late-breaking need for additional claim construction, I
4 gather?

5 MR. EDLIN: That's correct, Your Honor -- a
6 hundred percent correct.

7 I just think that when you apply the Court's claim
8 construction of requiring a single step, when Dr. Easttom
9 says that, well, even if we take multiple steps, it's an
10 insubstantial difference, that that can't be correct.

11 THE COURT: All right.

12 MR. EDLIN: Thank you, Your Honor.

13 THE COURT: Let me hear from Plaintiff.

14 MR. TOLLEFSON: Can we do the podium, please?

15 Your Honor, earlier I showed you sort of the
16 timeline. And Samsung's taken the position that the
17 step -- REDACTED BY ORDER OF THE COURT

18 [REDACTED]
19 And if we -- if we look at that in the context of
20 Dr. Easttom's report where everything starts with [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 Okay. And so to the extent that there is some
24 sort of timing issue that is raised, Dr. Easttom has
25 provided a reliable opinion as to the Doctrine of

1 There is no question that we use an accelerometer.
2 We just don't use it to calculate the incline. This is not
3 a patent about accelerometers. It's not a patent about
4 step counters. It's not a patent about pedometers. It is
5 only a patent about calculating an incline.

6 Now, the patent teaches one step and one step only
7 is used to calculate the incline.

8 The Samsung products do that differently, as Your
 REDACTED BY ORDER OF THE COURT

9 Honor knows, I believe,

10

11

12

13

14 Now, that has nothing to do, I believe, with what
15 counsel was saying.

16 What Dr. Easttom testifies to is that there's no
17 difference effectively between the one step method that is
18 used by the patent [REDACTED]

19

20 And the fact of the matter is, is that that can't
21 possibly be an insubstantial difference as a matter of
22 logic, but as a matter of the Court's order applying Your
23 Honor's claim construction that what the patent covers at
24 one step, what we do has to be substantially different
25 because otherwise the Court's claim construction wouldn't

1 have needed to construe that term and require one step
2 only.

REDACTED BY ORDER OF THE COURT

3 [REDACTED]
4 [REDACTED] -- he should not be allowed to
5 testify that those are insubstantial differences because
6 that's not accurate that they're insubstantial differences.

7 THE COURT: Why -- why, counsel, if what the
8 claims require and what the accused products do is so night
9 and day different, why is that something that can't fairly
10 and reasonably be dealt with through cross-examination
11 rather than striking that portion of the report?

12 MR. EDLIN: Well, Your Honor, I thought you might
13 ask that because I know very well that often vigorous
14 cross-examination is the right way to deal with these types
15 of things in reports.

16 But there's a special problem, I believe, having
17 done this for -- for some time, with very technical issues,
18 and you have juries trying to sort their way through that.

19 So all of this runs the risk of being very
20 complicated and confusing to a jury. But I think we know
21 enough now to know that there is not an insubstantial
22 difference between the manner in which Samsung calculates
23 and the manner that is required by the patent and the
24 Court's claim construction.

25 THE COURT: Are you telling me that the jury can't

1 understand these differences -- as you present them, would
2 be more than insubstantial?

3 MR. EDLIN: I would never say that a jury can't do
4 it. But I think that there is a risk of confusion there.
5 And I think that we know that those differences are not
6 insubstantial.

7 So the point, I think, is there is always a line
8 there somewhere where you have to fall out on, you know,
9 this is really not appropriate to even put in favor of the
10 jury.

11 And, Your Honor, as has just been pointed out to
12 me, it's not in the infringement contentions. So I think,
13 Your Honor, we know enough now to know that this is not
14 something that deserves to go to the jury. The jury will
15 be figuring out plenty in this case. Much of it will be
16 left to vigorous cross-examination, but, Your Honor,
17 I think this should not be left to that.

18 THE COURT: All right. I understand your
19 argument. Thank you.

20 Let's talk then about the remaining issues called
21 out in the Defendants' motion, and that's whether this
22 expert's standards and opinions relating to anticipation,
23 obviousness, and enablement should survive or should be
24 stricken.

25 MR. EDLIN: Your Honor, we would be content on

1 both of those to rely on the briefs, if that's acceptable
2 to Your Honor.

3 THE COURT: That's fine with me.

4 Does Plaintiff have something they want to
5 particularly point out on those, or is Plaintiff satisfied
6 to rely on the briefing there?

7 MR. TOLLEFSON: I'm also satisfied.

8 THE COURT: Okay. Well, with regard to
9 Dr. Easttom's expert report, and in light of the Court's
10 earlier ruling today, I don't expect to hear any testimony
11 from this expert about direct infringement by Samsung.

12 I expect his testimony to be confined to the
13 indirect infringement theories that go forward. And
14 without being more precise to that extent, I'll grant the
15 motion.

16 However, with regard to whether his opinions
17 regarding induced infringement are conclusory and
18 unreliable, that appears to me to be an issue that's
19 appropriate for presentation to the jury and subject to
20 vigorous cross-examination. And I'm not going to strike
21 his opinions in regard to that issue.

22 With regard to his report concerning and based
23 upon materially incorrect factual assumptions, I feel much
24 the same there. If it's inaccurate, it can certainly be
25 reported and fairly dealt with through cross-examination.

1 And I'll deny that portion of the motion.

2 With regard to his DOE analysis, understanding
3 that this doesn't take the place of or supersede the
4 separate motion regarding DOE but limited to what's been
5 raised in this briefing, I'm going to deny the motion
6 there.

7 And considering anticipation, obviousness, and
8 enablement, I've looked at the briefing. Both sides have
9 rested on the briefing. And based on the briefing and my
10 review of it, I don't find that appropriate for being
11 stricken under Daubert, and I'll deny the motion there.

12 So in summary, except as to what will be rendered
13 moot by the Court's partial grant of summary judgment, the
14 remainder of the Daubert motion concerning Dr. Easttom is
15 denied.

16 Okay. Let's move forward and take up Plaintiffs'
17 motion -- Daubert motion regarding Medvidovic --
18 Medvidovic. That's Docket -- Docket No. 101.

19 MR. TOLLEFSON: Thank you, Your Honor.

20 THE COURT: Let's proceed, and let's try to follow
21 the same identified issues from the briefing if we can.

22 MR. TOLLEFSON: I think this is going to be very
23 easy and short.

24 THE COURT: Well, let's -- let's find out.

25 MR. TOLLEFSON: Dr. Medvidovic fails to apply --

1 to apply this Court's claim construction when analyzing any
2 of the prior art.

3 So the first issue that Plaintiffs have raised is
4 that his entire prior art analysis is based not on claim
5 construction but rather some form of articulated assertion
6 based on a prior version of Plaintiffs' infringement
7 contentions is the best as I can come up with.

8 But there simply is not a stitch of analysis
9 applying what's -- we'll call Step 17(c) of the claim,
10 which is the calculation of incline, showing how the prior
11 art discloses the very specific way that Your Honor has
12 construed Claim 17 of identifying a vertical travel up,
13 identifying a vertical travel down.

14 And when you read Dr. Medvidovic's report, he
15 provides a caveat that prefaces every single analysis, and
16 it doesn't materially change.

17 I've -- I've highlighted the words here in bold
18 and italics. You can see prior to the bold italics, he
19 remarks how specific this court's construction was but then
20 he doesn't apply the construction in any analysis. He
21 says: However, to the extent the Plaintiffs are alleging
22 that this limitation can be met by determination of the
23 users walking uphill or downhill, regardless of how that
24 determination is made, then the reference discloses this
25 limitation.

1 And that's pervasive through the report. And
2 Dr. Medvidovic attached a number of claim charts to the
3 report. And this particular -- and this is in the
4 briefing. This particular caveat is also in all the claim
5 charts.

6 And what you -- what you wind up having in
7 Dr. Medvidovic's report is cut and paste large sections of
8 quotes from the prior art next to the claim element with no
9 analysis whatsoever of how the -- the actual claim element,
10 as construed by this Court, is met.

11 So Plaintiffs assert that his report on invalidity
12 is unreliable because it fails to apply the proper claim
13 construction.

14 And the second issue is simply an issue that was
15 already argued this morning, is that this Court's claim
16 construction is not limited to requiring incline be based
17 on accelerometer and only accelerometer.

18 And at Dr. Medvidovic's deposition, I directly
19 asked him this question. You know, does the third step
20 calculate incline required, that it be based on
21 accelerometer data and accelerometer data only, and he
22 said, yes.

23 And so to the extent that his non-infringement
24 report relies on that construction, the portions of that
25 infringement report should be stricken as unreliable.

1 THE COURT: All right. Thank you.

2 Let me hear a response from Defendants.

3 MR. KASSENOFF: Good afternoon, Your Honor. Allan
4 Kassenoff, again, for Samsung.

5 I'd like to start on the second part, the
6 non-infringement position, Your Honor, because --

7 THE COURT: That's fine.

8 MR. KASSENOFF: -- that will be much quicker.

9 As I indicated this morning in arguing summary
10 judgment of non-infringement, what Samsung is doing,
11 including Dr. Medvidovic, is applying the language of the
12 claim as construed by you as instructed by the rest of the
13 patent to show that we don't meet that limitation. The
14 Samsung devices do not calculate the incline as required
15 by -- by Claim 17(e). It's not a matter of not applying
16 the claim construction of Your Honor. It's exactly the
17 opposite. It's applying the claim construction, which must
18 be informed with the rest of the patent.

19 And our submission, respectfully, Judge, is he has
20 applied the claim construction, as we explained this
21 morning.

22 With respect to invalidity, Judge, what
23 Plaintiffs' argument really boils down to -- and I'll read
24 this directly from their brief on Page 1. This is their
25 moving brief, Docket 101.

1 THE COURT: Read it slowly.

2 MR. KASSENOFF: You bet.

3 Dr. Medvidovic improperly relies upon his mistaken
4 understanding of Uniloc's infringement theories, as opposed
5 to the Court's claim construction, to support his
6 invalidity position.

7 That's not correct, Judge. What Dr. Medvidovic
8 did is he applied the Court's claim construction against
9 the prior art.

10 Now, what he did there is he looked at how the
11 Plaintiff is applying the Court's claim construction in an
12 effort to capture Samsung's devices and said: If you're
13 applying it as broadly -- the Court's. Strike this. Let
14 me rephrase that.

15 If the Plaintiff is going to apply the Court's
16 claim construction so broadly as to capture or try to
17 capture Samsung's devices, then I'm going to apply the
18 claim construction broadly, as well, with respect to the
19 prior art.

20 And, Judge, this was addressed by the Fed Circuit
21 last year in the 01 Communique -- Communique Laboratory
22 case, which we briefed in connection with Plaintiffs'
23 Motion in Limine No. 8 which is directly on this point.
24 And in that case, what the Defendant's expert did -- argued
25 that under the trial court's claim construction, Claims 24

1 and 45 were valid but not infringed. But that if
2 Communique attempted to expand the scope of its claims to
3 include systems -- and then he gets into the language of
4 the Court -- gets into the language here in the claims --
5 in which a location facility merely directs other
6 components, such as the end point computers to create the
7 communication channels, then the claims would be invalid in
8 light of the prior art.

9 So what the expert did in this Communique case,
10 which is Fed Circuit 2018, is exactly what they're accusing
11 Dr. Medvidovic of doing. And what did the Fed Circuit say?
12 There was nothing improper about this argument. We have
13 previously stated that there is no practicing the prior art
14 defense to literal infringement.

15 But they continue: This does not, however,
16 preclude a litigant from arguing that a claim term must be
17 broadly interpreted to read on an accused device, then this
18 same broad construction will read on the prior art.

19 That's exactly what doctor -- what they're
20 accusing Dr. Medvidovic of doing, which the Fed Circuit
21 said is fine.

22 The two cases that Plaintiff relies upon are
23 Core Wireless and TiVo. And in TiVo, which was also a
24 Fed Circuit case, substantially before the Communique case
25 that I just mentioned, in TiVo, the Court said we're still

1 going to allow the Plaintiffs -- or the expert that was
2 accused of this action to compare the -- the construed
3 claims to the prior art, which is exactly what
4 Dr. Medvidovic is doing here.

5 And in Core Wireless, again, that's
6 distinguishable because in that case, they compared the
7 prior art to the products.

8 And in our situation, Dr. Medvidovic is comparing
9 the construed claims, as read by Plaintiff, against the
10 prior art.

11 And to the extent counsel indicated that there was
12 no analysis by Dr. Medvidovic -- can I get the ELMO,
13 please?

14 There's multiple pages. So, for example, here's
15 the analysis with respect to the Ladetto prior art
16 reference on 17(c), which is the incline calculation. And
17 he spent several pages, which is all the highlighting from
18 Plaintiff -- from their submission, where he goes through
19 step-by-step through Ladetto on multiple pages showing how
20 it does, in fact, perform 17(c) as Plaintiff interprets it.

21 What they're really trying to do, Judge, is
22 they're trying to say, Samsung, you use a barometer, we're
23 going to read the claim limitation as the Judge construed
24 it broad enough to encompass usage of a barometer.

25 So we showed prior art that uses a barometer to

1 calculate an incline. And they're saying, whoa, that
2 doesn't -- excuse me, that doesn't identify the vertical up
3 and down. That's a change in elevation. But that's
4 exactly what we're doing. So they can't have it both ways.

5 Just like in the Communique case, either their
6 reading of your construction is broad enough in an attempt
7 to cover barometers, in which case that's all in the prior
8 art, which Dr. Medvidovic showed, or it's not broad enough,
9 and there's no infringement.

10 Unless Your Honor has any questions, that's all
11 I have on this.

12 THE COURT: All right. Plaintiff have anything
13 else on this? Just a little bit?

14 MR. TOLLEFSON: Thank you, Your Honor.

15 It sounded like Mr. Kassenoff just admitted that
16 Dr. Medvidovic -- Medvidovic is applying a broader claim
17 construction.

18 The problem here has nothing to do with a
19 barometer. The problem is, is that Dr. Medvidovic isn't
20 applying the claim construction for 17(c), which includes
21 identifying the vertical travel up, identifying the
22 vertical travel down, and computing a difference.

23 What Dr. Medvidovic's report does is it prefaces
24 every analysis with "to the extent there is a determination
25 that the user is going up or down, regardless of how that's

1 determined," then -- and really only then -- the reference
2 discloses that step. And that's the wrong claim
3 construction.

4 And Dr. Medvidovic should be stuck to what's in
5 his report, not be able to freelance based on something
6 asserted by Uniloc. And if his report is based on the
7 wrong claim construction, then it's unreliable, and that's
8 the problem here.

9 I have nothing further.

10 THE COURT: All right. Thank you, counsel.

11 Well, with regard to the Daubert motion concerning
12 Dr. Medvidovic on Issue 1, seeking the striking of his
13 invalidity report for failure to apply the claim
14 construction of the Court, the Court's conclusion is that
15 at the end of the day, there's not anything here to strike.

16 The Court permits Defendants' experts take on
17 alternative theories of invalidity. However,
18 Dr. Medvidovic is bound by the four corners of his report.
19 And if an element isn't there, it isn't there. He can't
20 add it or testify about it.

21 With regard to the second issue raised in this
22 motion, that his non-infringement report should be struck
23 for applying what Plaintiff characterizes as an objected
24 claim construction, I think it's appropriate for the jury
25 to decide whether or not that's an un -- that his opinions

1 constitute an unreasonable reading of the claim language.
2 And I think that can fairly be dealt with, just as in the
3 earlier motion, by vigorous and robust cross-examination,
4 or as I heard one lawyer say one time, by submitting it to
5 the crucible of cross-examination.

6 Nonetheless, I don't see anything to deny here on
7 the basis of Daubert, so this motion is effectively denied.

8 Now, I do think it makes sense, while we're here
9 today, to turn to Defendants' motion to strike regarding
10 the Doctrine of Equivalents. And let's go ahead and take
11 that up. That's Document 96. And let me hear from the
12 moving Defendants on that.

13 MR. EDLIN: Thank you, Your Honor. Again, Richard
14 Edlin, Greenberg Traurig, for Samsung.

15 Your Honor, on January 19th of 2018, the Plaintiff
16 served infringement contentions. Those infringement
17 contentions contained only literal infringement
18 contentions, and there was no mention of any kind of -- of
19 anything at all to do with the DOE.

20 Now, on November 12th of 2018, there was an expert
21 report that was filed by Dr. Easttom. And, notably, in
22 addition to asserting the literal infringement arguments,
23 there is a new DOE argument.

24 Now, Your Honor, that was a mere conclusory
25 sentence consistent with what Your Honor's claim

1 construction had at that point been rendered, and it simply
2 discussed how Samsung's calculations were insubstantially
3 different. We've covered that before.

4 But, Your Honor, in this context, the law is clear
5 that expert infringement reports cannot introduce theories
6 not previously set forth in infringement contentions.
7 There are many cases, Your Honor -- in particular, the
8 ROY-G-BIV case, 63 F. Supp. 3d 690 at 699, and that's
9 Eastern District of Texas 2014.

10 And boilerplate along the lines that we have
11 previously read, Your Honor, does not provide adequate
12 notice of any kind as to what the actual analysis is. And,
13 again, many cases, Your Honor, but I'm referring to the
14 Biscotti case, Eastern District, 2017; Eolas Technologies
15 from 2016. And that case law is collected in our moving
16 brief at Page 8.

17 Now -- so with respect to the expert report, the
18 fact that it contains that DOE analysis that was not
19 contained in the infringement contentions is grounds for
20 that to be struck from the report.

21 THE COURT: What about the local rules, counsel,
22 that allow a party to amend post-claim construction if they
23 have a good-faith belief that that amendment is necessary
24 and appropriate in response to the Court's claim
25 construction?

1 MR. EDLIN: Yes, Your Honor. So turning to that,
2 there were amended infringement contentions that were
3 filed.

4 Now, we all know what the standard for that is,
5 and the only grounds that a party has to put in a
6 supplemental and amended infringement contention is if the
7 Court's Markman -- Markman order was somehow surprising or
8 unanticipated. And, Your Honor, there's absolutely no way
9 on this record that that could be the case.

10 Your Honor, I'd like to put up on the ELMO, and
11 this is out of our brief. And, Your Honor, if we take a
12 look at the dots -- and this goes back to arguments that
13 were made during the claim construction analysis --
14 Uniloc's brief indicates that it was well aware of
15 Samsung's positions on Claim 17.

16 And if we take a look at that -- those three --
17 and I'll just -- I'll just note that this is from Page 6 in
18 our briefing -- there's no question that Samsung was taking
19 the position that Claim 17 required a single step.

20 And the fact of the matter, Your Honor, is that is
21 indeed what the Court ruled, that there was a single step
22 that was required by Claim 17.

23 Now, it doesn't make any difference whether the
24 Court quoted what Samsung's proposed claim construction
25 language was. The point here is that the Court didn't

1 stray very far from it either. And not straying very far
2 is language from the case law in situations in which
3 amendments have been denied because there was nothing
4 surprising or unanticipated by the Court's Markman order.

5 The case law on that, Your Honor, is -- is Legion.
6 And, Your Honor, with respect to the various factors that
7 are established by the Fifth Circuit, there is no
8 explanation that -- that the Plaintiff could offer as to
9 why it didn't amend earlier. It was well aware of
10 Samsung's positions. It was well aware in the summer, in
11 June and July, when it reviewed the source code, when it
12 had Samsung's claim construction. So the failure to amend
13 weighs heavily in favor of exclusion here.

14 Your Honor, the case I'm referring to in terms of
15 factors is Nike versus Adidas, 479 F. Supp. 664, Eastern
16 District of Texas.

17 Your Honor, the second factor is the relative
18 importance of the DOE argument.

19 Now, there's nothing here that's going to prevent
20 Dr. Easttom from giving the testimony that is in his
21 report, and other than the fact that he is improperly
22 including a DOE argument, it is clearly a fall-back
23 position. His primary positions here is that there is
24 literal infringement.

25 So the fact that he has improperly included the

1 DOE argument in his report doesn't mean that he won't be
2 able to testify to the balance of the report. And Your
3 Honor has already permitted that. So there won't be any
4 prejudice to the Plaintiffs' position in that regard.

5 Samsung, on the other hand, will be prejudiced.
6 Fact discovery has closed. It has no ability to now go
7 back and -- and supplement that record, no ability to put
8 in responsive reports.

9 And so, Your Honor, the fact of the matter is, is
10 that by holding that report -- in holding the
11 supplementation until after that -- the fact discovery had
12 closed, Samsung really has no ability to go back and help
13 itself here.

14 THE COURT: Well, correct me if I'm wrong,
15 counsel, your expert, Dr. Medvidovic, addresses Easttom's
16 DOE arguments in his report, does he not?

17 MR. EDLIN: Your Honor, he -- he addresses it,
18 but, again, Your Honor, the fact is that it puts a party to
19 a -- to what courts have -- have referred to as an
20 impossible position, because, Your Honor, you even -- you
21 know, we even have to respond to it in summary judgment
22 arguments.

23 So if the party chooses not to respond hoping that
24 it's stricken, Your Honor, that's not following the rules,
25 and that's an unfair burden on any litigant, whether they

1 be a Plaintiff or a Defendant.

2 The fact of the matter is, the rules are there so
3 that everybody has a fair playing field. And by
4 supplementing when there is absolutely no reason or
5 justification for doing it, those rules are violated.

6 There's been no demonstration of any kind as to
7 why the rules were not followed here. Simply because a
8 party wishes to respond to arguments that the other side
9 raises is not justification to violate the rules.

10 THE COURT: Is there a reason why Samsung waited a
11 month after it got the expert reports in which this was
12 included to file this motion?

13 MR. EDLIN: I don't think there is any particular
14 reason, other than reviewing it all in the press of time,
15 Your Honor. But I think this was all filed in a -- in a
16 timely way, and the issue was put on in a -- in a
17 reasonable fashion by Samsung in terms of contesting what
18 it finds to be a violation of the rules.

19 So if Dr. Easttom's report contains a conclusion
20 that's not in the invalidity contentions, that should be
21 out. And if there's no justification because the Court's
22 ruling in the Markman was clearly anticipated, there is
23 nothing about Your Honor's claim construction that could in
24 any way be considered a surprise.

25 And the only thing that the invalidity contentions

1 do is say in a very, very, again, cursory way, in a very
2 conclusory way that makes it very clear that these are
3 merely backup positions.

4 I'll show you, Your Honor, if I can, the first
5 one. And if you look at No. 1, it says: To the extent
6 accelerometer data indicating a motion of a user in three
7 dimensions is found not to be literally practiced by the
8 accused products, Samsung still infringes because any
9 difference argued by Samsung will be insubstantial --
10 there's a -- obviously, a "sic" in there in the original.
11 Samsung's source code, therefore, receives accelerometer
12 data indicating a motion of a user in three dimensions or
13 its equivalence.

14 It's a clear backup argument, Your Honor. And
15 because it is and because there's no justification for
16 including it, Your Honor, it should be stricken.

17 THE COURT: All right. Anything further?

18 MR. EDLIN: I'm sorry, Your Honor?

19 THE COURT: Anything further?

20 MR. EDLIN: No, Your Honor.

21 THE COURT: Let me hear from Plaintiff, please.

22 So tell me how the claim construction caught you
23 so off guard that your contention amendment was timely
24 under the local rules.

25 MR. TOLLEFSON: Your Honor, I think it caught both

1 parties off guard. I think this is set forth in Uniloc's
2 briefs pretty well, but I'll just summarize.

3 The position that Samsung was taking on claim
4 construction were all co-related, and this particular
5 construction was not a straightforward victory for Samsung
6 in the sense that Uniloc and Samsung were arguing in a
7 vacuum that was one step or no step.

8 There were a number of competing elements that
9 include whether or not there was math, whether or not there
10 was going to be some sort of measurement being done, and
11 whether there was -- the measurement was for each step, and
12 so forth. And so -- and also, the claim itself says for
13 one or more steps.

14 So when this construction came down, you looked at
15 the totality of the construction, it -- it was
16 unforeseeable -- it was unforeseen, at least. And if you
17 look at -- if you look at the time table and you look at
18 Samsung's positions, I think they were both -- they were
19 also caught off guard on this construction, as well.

20 Now, as -- as you're likely aware, Samsung didn't
21 answer in this case until very recently. So Uniloc really
22 had no idea about Samsung's non-infringement positions,
23 except for a few data points.

24 So in Samsung's briefing on its motion for leave
25 to answer, they identified a couple of letters that were

1 sent. There was a letter sent in March 2018, and they
2 didn't identify that they -- that's how their system worked
3 or anything like that.

4 So it wasn't until September of 2018 during the
5 claim construction briefing that Uniloc's expert even
6 started to review the code. And at that point in time, you
7 know, these code reviews take a long time. They have to go
8 visit and look through code on a computer owned by the
9 Defendant. And then they have to order the code, and the
10 parties debate on that stuff. So that was actually going
11 on during claim construction.

12 And then we had the Markman hearing, and your
13 order came out on October 25th. And then that's when
14 Samsung claims they sent the letter, and, indeed, they did
15 send the letter next and the first time they asserted this

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16 [REDACTED] And that
17 wasn't -- that wasn't really articulated in any manner for
18 Uniloc to understand the non-infringement position until
19 November 12th, 2017 [sic].

20 And then at that point in time, we see that
21 Samsung served its interrogatory responses, and they
22 actually cite to the same language we've been talking about
23 today with Dr. Shin, [REDACTED]

24 [REDACTED] And that
25 is -- that's exactly what Dr. Easttom's opinion is directed

1 to.

2 So Uniloc had a good-faith basis for believing
3 that it needed to amend its infringement contentions based
4 on Your Honor's claim construction order. And it was
5 directed to a new position that Samsung has taken after
6 claim construction.

7 I think both -- both parties were surprised.

8 And then -- so Samsung is talking about some sort
9 of prejudice to it, but it had -- it had a fair opportunity
10 to depose Dr. Easttom on his opinions. So there really
11 isn't a prejudice there.

12 But it's -- it's Samsung that is moving the ball.
13 It's a moving target. Samsung changed its position to this
14 whole [REDACTED BY ORDER OF THE COURT], which we talked about today, and
15 that's -- that first showed up in a court filing with its
16 motion for summary judgment, and it first showed up -- it
17 was first noticed to Uniloc in December, after
18 Dr. Easttom's report, when it showed up for the first time
19 in Dr. Medvidovic's non-infringement report. And then, of
20 course, it was later that the testimony changed to match
21 that.

22 So in summary, Uniloc didn't violate the rules
23 because they were permitted to amend based on the claim
24 construction. They had a good-faith basis for believing
25 that they needed to amend, and there is no prejudice to

1 Samsung.

2 MR. EDLIN: Your Honor, may I briefly?

3 THE COURT: I'll give you a brief rebuttal.

4 MR. EDLIN: Your Honor, again, if it's all right,
5 I'd just like to put up what comes direct -- directly out
6 of -- directly out of the Sam -- the Uniloc briefing prior
7 to the Markman.

8 And what -- if you just take a look at No. 2, it
9 says: Samsung -- this is Uniloc referring to Samsung's
10 arguments but prior to the Markman. Samsung argues that
11 computing a difference requires measuring the vertical
12 travel up and down and then performing direct subtraction
13 for each single step. This is before the Markman. This is
14 Uniloc's briefing -- clearly understands what Samsung's
15 position is that it's a single step.

16 This is the third bullet point: Samsung
17 impermissibly reads into its constructions, as explained
18 above, that computing a difference requires specific
19 measurements and subtraction to be carried on a
20 step-by-step basis, and identification requires measuring
21 the vertical up and down on each step.

22 Now, Your Honor's claim construction substantially
23 agreed with that. They were arguing for plain meaning. We
24 were arguing for a single step. The fact that they
25 disagreed with Your Honor's claim construction or the fact

1 that they didn't propose the claim doesn't mean that it
2 could have been surprising, because by and large, Your
3 Honor, you adopted one way or the another the parties'
4 claim constructions.

5 And there can be no one who could reasonably argue
6 that having identified Samsung's positions here prior to
7 the Markman as requiring step-by-step and Your Honor's
8 claim construction requiring it to be step-by-step could in
9 any way be surprising or unanticipated as the law requires.

10 Your Honor, I'd also finally point out -- just as
11 my note on the side there says -- with respect to deposing
12 Dr. Easttom, there's only one of his -- he only has one DOE
13 argument. The supplemental -- the amended contentions have
14 three. So there would have been no opportunity to depose
15 him on -- on the two that were not in his -- in his report.

16 But, again, Your Honor, it just -- it just can't
17 possibly be said that when you read what we just looked at
18 where we were asking for step-by-step, that when Your Honor
19 essentially gave that claim construction, that it was
20 unanticipated.

21 THE COURT: But you're not saying that though the
22 amended contentions may have included three points and the
23 experts have subsequently opined on one point, you're not
24 saying that there's a risk that you're going to be
25 challenged on those other points that weren't addressed in

1 the expert's reports at trial, are you?

2 MR. EDLIN: No, I'm trusting, Your Honor, that
3 that will not be the case. But the point is that the
4 entirety of the -- of the amended contentions should be
5 stricken, because there is no way that they can possibly
6 argue based on what we have just seen that it was
7 unanticipated.

8 Your Honor essentially granted what we were asking
9 for on that claim construction.

10 With respect to the -- the DOE analysis that is in
11 Dr. Easttom's report, it is not in the original
12 contentions, and it cannot, therefore, as a matter of law,
13 as we discussed a moment ago, be introduced for the first
14 time in an expert's report. And it should actually be
15 stricken for that reason.

16 This is, I believe, a wholesale violation of the
17 rules on both of those points, and that is essentially,
18 Your Honor, why we believe it's appropriate for the amended
19 contentions to be stricken.

20 Thank you.

21 THE COURT: All right. Thank you, counsel.

22 Well, it's clear to the Court that there's a
23 certain amount of sloppiness here, and the Court's
24 inclination in this kind of environment is always to try to
25 cut through that and look at what effectively the posture

1 and positions of the parties is, what the parties have
2 known, when they knew it, and did they have a fair
3 opportunity to prepare or respond.

4 In this case, it's significant in the Court's view
5 that this amendment was disclosed on November the 12th, and
6 it wasn't until December the 13th that Defendants
7 challenged it formally.

8 And it -- more importantly, it's clear to the
9 Court that Samsung has really not been prejudiced here.
10 They had time to respond to this issue. In fact, their
11 expert, Dr. Medvidovic, submitted his report on
12 December the 3rd, three weeks after they became aware of
13 the DOE arguments from Plaintiff and 10 days before they
14 filed this motion to strike.

15 This is not a situation where Samsung is going to
16 be ambushed or prejudiced. And to the extent that the
17 amendments to the contentions may be broader than the
18 experts' opinions, the Court is certainly not going to
19 allow the competing experts to broaden or expand their
20 opinions outside the four corners of their reports.

21 Effectively, to some extent, this is almost akin,
22 in the Court's view, to parties who have tried an issue by
23 consent, and then later say, wait a minute, you didn't get
24 permission.

25 I'm going to deny the motion. I don't see that

1 there's any real prejudice to Samsung here. I can assure
2 Samsung, I'm not going to allow Dr. Easttom to expound
3 beyond his report, which has been responded to and drawn
4 issue on by Dr. Medvidovic.

5 So for all intents and purposes, given that, yes,
6 there's been some sloppiness in how the case has been
7 prepared and would it have been better to have raised the
8 issue earlier? Yes. But if I throw out everything that
9 could have been done better by the time we get to
10 pre-trial, we'll never have anything left to try.

11 Ultimately, this is a determination that comes
12 down to a matter of prejudice. In the Court's view,
13 Defendant has not been prejudiced here. So I'm going to
14 deny the motion.

15 All right. Counsel, let me recap with you where
16 we are, at least in the Court's view, with regard to the
17 pre-trial matters set for today.

18 I've just ruled on the motion to strike regarding
19 the Doctrine of Equivalents.

20 I've taken up and ruled on the Daubert motion
21 directed toward Dr. Easttom.

22 I've ruled on the Daubert motion directed to
23 Dr. Medvidovic -- Medvidovic.

24 I've taken up and heard and ruled on Defendants'
25 motion for summary judgment of non-infringement, partially

1 granting that motion and partially denying it. That
2 partial grant by the Court effectively renders the
3 Defendants' motion on no pre-suit damages as moot. And
4 I'll find that Document 100 is moot in light of the Court's
5 ruling on the summary judgment motion.

6 As far as dispositive issues before the Court,
7 that leaves us with the Rosenthal Daubert motion, which
8 I intend to take up after the Rosenthal report has been
9 amended, as the Court granted leave for earlier today. And
10 I'll take that up on March the 26th.

11 That also leaves us the motions in limine, which
12 I think everyone agrees -- you indicated so in chambers --
13 that they can be substantially streamlined in light of the
14 guidance received today. And I'll expect those to be
15 updated and resubmitted to the Court in advance of the 26th
16 in that streamlined form so that I can easily deal with
17 those.

18 And that leaves us the issue of disputed exhibits
19 to be pre-admitted. And I'm hopeful, and I think
20 reasonably so, that with the guidance you've received
21 today, that process can be substantially streamlined, if
22 not completely dealt with by agreement.

23 So that's where we are. The Court intends to
24 recess the pre-trial hearing at this point, and I'll
25 reconvene it on the 26th of March at 9:00 A.M. in hopes

1 that you can work through the remaining issues here in
2 short order.

3 Are there questions from either Plaintiff or
4 Defendant at this junction?

5 MR. TOLLEFSON: No, Your Honor.

6 THE COURT: Anything from Defendants?

7 MS. SMITH: No, Your Honor.

8 THE COURT: All right. Thank you for your
9 presence and your argument, counsel. We stand in recess.

10 COURT SECURITY OFFICER: All rise.

11 (Hearing concluded.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
OFFICIAL REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/20

3/6/19
Date